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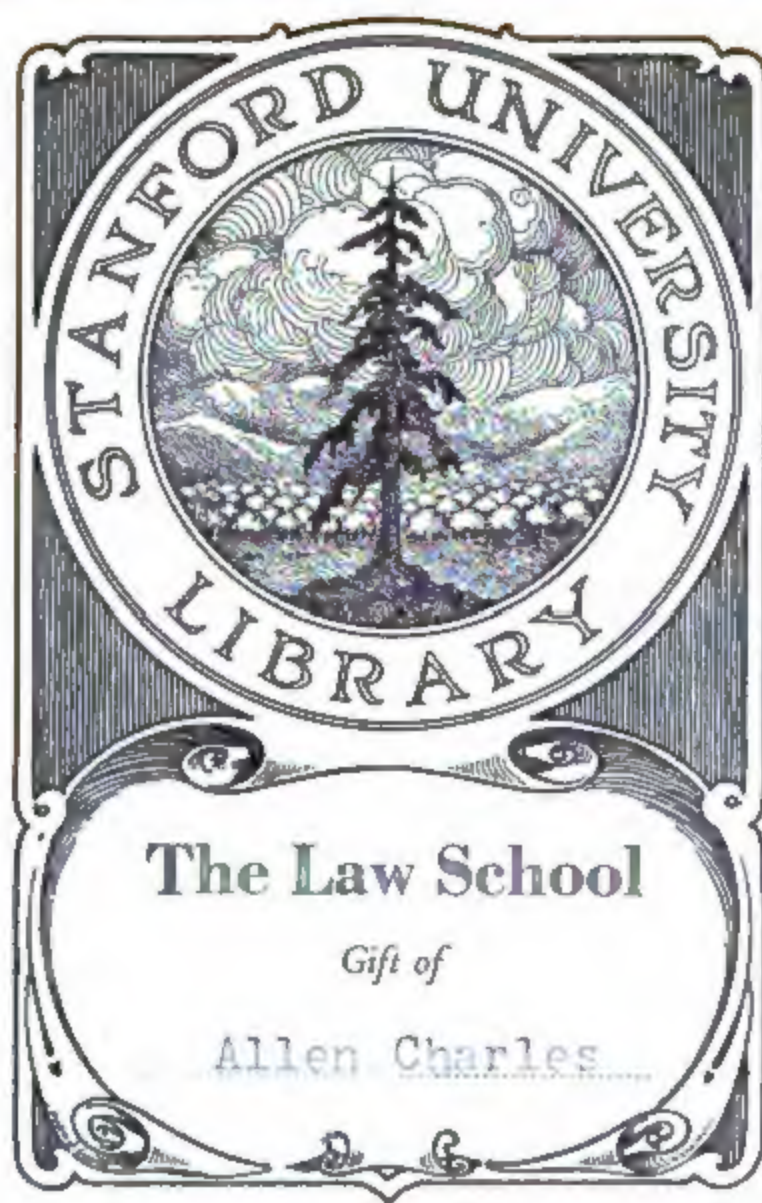
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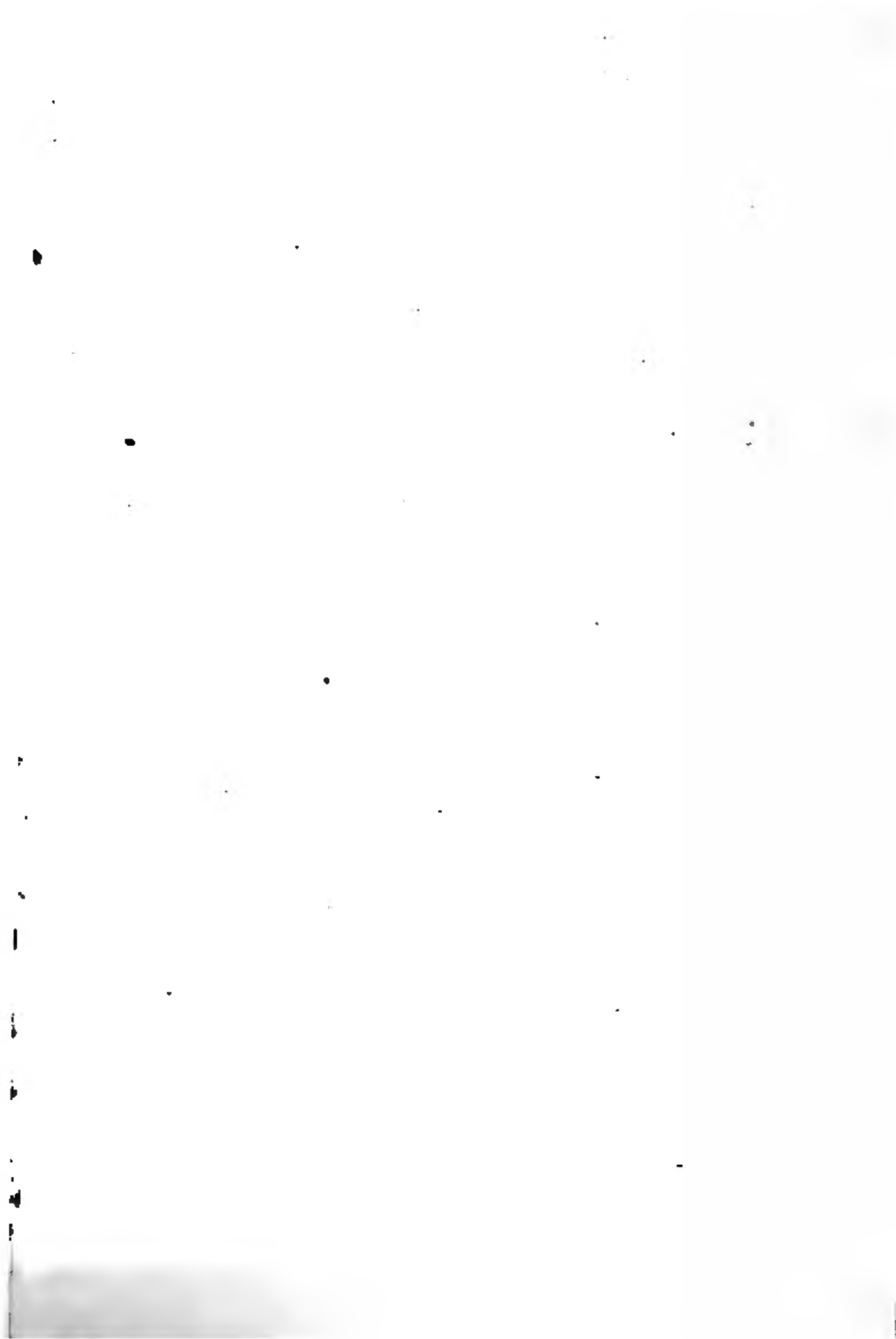
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ESTEE'S
PLEADINGS, PRACTICE,
AND FORMS,
ADAPTED TO
ACTIONS AND SPECIAL PROCEEDINGS
UNDER
CODES OF CIVIL PROCEDURE.

BY
MORRIS M. ESTEE,
COUNSELOR AT LAW.

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COUNSELOR AT LAW.

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SUMMONS.

§ 3895. **In General.**—In ordinary terms, a summons is a command to appear. In California it is a notice to defendant that an action has been commenced against him. It informs defendant who has commenced the action, where it is brought, in what court it is brought, the relief demanded, and that, if he fails to answer within ten days, or in such other time, depending upon where the summons is served, default will be taken against him. In California the summons always follows the complaint, and is only issued after the filing of a complaint; but in many states the summons precedes the complaint, and the issuance of it is the first step or commencement of the action; but here the action is commenced by “filing a complaint” in the court where the action is brought.¹ In England all personal actions are brought by one uniform writ of summons, which is issued out of the court where the action is brought, and directed to the defendant, commanding him to cause an appearance to be entered within a certain number of days after the writ is served, formerly eight.² In California the summons may be issued at any time within one year after filing the complaint.³ Since the amendment of 1860, the clerk is not authorized to issue a summons after the expiration of a year after filing the complaint, without an order of the court; and if the court is authorized to order the issuance of a summons after that period, the exercise of the power rests in its discretion;⁴ and an order of the court striking out the complaint, where no

¹ Cal. Code C. P., sec. 405.

² 3 Steph. Com. 566.

³ Cal. Code C. P., sec. 406.

⁴ Dupuy v. Shear, 29 Cal 238.

service was had on the defendant until nine years had elapsed, was not an abuse of discretion.¹ Unless the summons and a certified copy of the complaint, duly attested and in condition to serve, are placed at the disposal of plaintiff for service within one year from the filing of the complaint, the action should be dismissed.² Unless this be done, the summons is not issued, within the meaning of section 23 of the practice act.³ The dismissal of the action is a question for the sound discretion of the court.⁴ The summons shall be signed by the clerk, and directed to the defendant, and be issued under the seal of the court.⁵ At the time of the issuance of summons, the clerk is required to indorse on the summons the names of plaintiff's attorneys.⁶ In New York the summons must be subscribed by the plaintiff or his attorney.⁷ But a printed subscription is sufficient.⁸

§ 3896. **Style of Process.**—The style of process is generally prescribed by the codes of the respective states. In California all process must run in the name of "The People of the State of California."⁹ And at the head of a summons was written, "district court of the fourth judicial district," but the summons was issued from the county court, and tested by the county judge: it was held that the words at the top of the summons, "district court," etc., was no part of the writ.¹⁰

§ 3897. **Must State Names of Parties to Action.**—The summons shall state: 1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed.¹¹ The summons must state the names of all the parties to the action. If there are several defendants, it is not sufficient to give the name of one followed by "*et al.*" This section is mandatory, and not directory merely.¹² Section 1046 of the California code of civil procedure refers only to the title of the paper. Whether it will apply to the summons, *quære*. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and may then designate him by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly.¹³ Where

¹ Dupuy v. Shear, 29 Cal. 238.

² Reynolds v. Page, 35 Cal. 296.

³ Id.

⁴ Grigsby v. Napa Co., 36 Id. 585; Carpentier v. Minturn, 39 Id. 450; Eldridge v. McKay, 45 Id. 50; and see Code C. P., sec. 594; Lander v. Flemming, 47 Cal. 614.

⁵ Cal. Code C. P., sec. 407.

⁶ Id.

⁷ N. Y. Code, sec. 417.

⁸ Brainerd v. Heydrick, 32 How. Pr. 97. As to waiver of the indorsement by appearance, see Sprague v. Irwin, 27 Id. 51.

⁹ Const. Cal., art. 6, sec. 18; Pol. Code, sec. 30.

¹⁰ Crane v. Brannan, 3 Cal. 195.

¹¹ Cal. Code C. P., sec. 407.

¹² Lyman v. Milton, 44 Cal. 630.

¹³ Cal. Code C. P., sec. 474.

there is no allegation that the name of a defendant is unknown, there is no foundation for the bringing of the action against a fictitious person, and consequently no authority to make service of the summons by publication.¹ If a defendant, who is sued by a fictitious name, appears and answers by his true name, it is not necessary that the summons should be amended by inserting the true name, since the appearance is a waiver of any defect in the summons, or of any summons at all. But the complaint must be amended or the judgment will be irregular, though not void.² But such judgment will be reversed on appeal.³ Appearance and answer by defendant is not a waiver of such amendment.⁴ If the name by which a party is known be inserted, it is sufficient.⁵ Where a party sues or is sued in a representative character, the character should be stated after his name in the summons.⁶ Where the summons describes the plaintiff as administrator, and in the complaint he is represented as suing in his individual capacity, and for a demand in his own right, it was held a fatal variance.⁷ A summons which does not name the court is not void;⁸ as a defendant on whom both summons and complaint have been served can not object that the summons does not name the court if the complaint does.⁹ Where the summons was headed with the words "district court," but was issued out of the county court, under the county court seal, and attested by the judge of said court, it was held good as the writ of the county court.¹⁰

§ 3898. **Must State General Nature of Action.**—It shall state: 2. The cause and general nature of the action. If the sum sued for is certain in amount, or capable of being reduced to certainty by computation, the summons must state the amount for which judgment is demanded.¹¹ And if radically defective in this respect, it will not support a judgment by default.¹² In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons is served on all defendants in that county, but a copy of the complaint on one only, the

¹ *People v. Herman*, 45 Cal. 692.

² *Campbell v. Adams*, 50 Id. 205.

³ *Baldwin v. Morgan*, 50 Id. 585.

⁴ *McKinlay v. Tuttle*, 42 Id. 577.

⁵ *Cooper v. Burr*, 45 Barb. 9; *Miller v. Stettiner*, 7 Bosw. 692.

⁶ 1 Arch. Pl. 81.

⁷ *Blanchard v. Strait*, 8 How. Pr.

⁸ *Tallman v. Hinman*, 10 How. Pr. 89.

⁹ *Yates v. Blodgett*, 8 How. Pr. 278; *Webb v. Mott*, 6 Id. 439; *Hewitt v. Howell*, 8 Id. 346.

¹⁰ *Crane v. Brannan*, 3 Cal. 192.

¹¹ *People v. Bennett*, 6 Abb. Pr. 343.

¹² *People v. Woodlief*, 2 Cal. 242; *Porter v. Herman*, 8 Id. 625.

summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint;¹ as a copy of the complaint need be served on only one of several defendants, where they all reside in the same county, and a reference in the summons to the complaint makes it a part of the summons for the purpose of describing the premises.² The requisites of the summons are fixed by statute.³

§ 3899. **Must Direct Defendant to Appear.**—It shall contain: 3. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days if served elsewhere.⁴ The time for appearance may be extended.⁵ If judgment by default is entered before the time fixed for answering expires, it will be reversed on appeal.⁶ A non-resident of the state, served out of the state, has forty days in which to appear.⁷

§ 3900. **In Action on Contract for Money or Damages.** There shall be inserted in the summons a notice, first, in actions arising on contracts for the recovery of money or damages only, that unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint [stating it].⁸ A statement in a summons that “the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-four dollars and twelve cents, and interest at three per cent per month from November 14, 1863, and the further sum of eleven dollars and twenty cents, and the costs of this action, is sufficient to answer the requirements of section 24 of the practice act (corresponding substantially to section 407 of the code of civil procedure), as a copy of the complaint is served with the summons, and the defendants are thus notified of the general nature and object of the action.”⁹ Relief under this subdivision must be applied only to actions for a definite sum of money as such, and without calling upon the court to ascertain or adjudge anything but

¹ *Calderwood v. Brooks*, 28 Cal. 151.

² *Id.*; Cal. Code C. P., sec. 410.

³ Consult Cal. Code C. P., sec. 407; Code of Oregon, sec. 51; Wash. T., sec. 40; Arizona, sec. 24; Idaho, sec. 24; Iowa, sec. 2812; 1 N. Y. Code, sec. 128; Nash's Ohio Pl. 19.

⁴ Cal. Code C. P., sec. 407.

⁵ Cal. Code C. P., sec. 1054.

⁶ *Burt v. Scranton*, 1 Cal. 416.

⁷ *Grewell v. Henderson*, 5 Cal. 466.

In *McCauley v. Fulton*, 44 Id. 360, it was held that where the district comprised but one county, the omission from the summons of the words “within twenty days, if served out of the county, but within the district,” etc., these words had no application, and the omission did not invalidate the summons.

⁸ Cal. Code C. P., sec. 407, subd. 4.

⁹ *King v. Blood*, 41 Cal. 317.

the existence or terms of the contract.¹ Thus, in cases for goods sold and delivered,² or for liquidated damages on breach of contract,³ or for specific sum on breach of contract,⁴ or for penalty given by statute,⁵ or for money demand where the plaintiff waives tort.⁶ So an action on an undertaking in replevin is substantially one for the payment of money, and a summons for a money demand in such a case is proper.⁷

§ 3901. **In Other Actions.**—In other actions there shall be inserted: That if the defendant fail to appear and answer the complaint, the plaintiff will apply to the court for the relief demanded therein.⁸ The notice in the summons should, however, contain a reference to the complaint.⁹ In the summons, as in all legal proceedings, such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.¹⁰

§ 3902. **Amendment of Summons.**—Every court has power to amend and control its process and orders, so as to make them conformable to law and justice.¹¹ The court may allow the summons to be amended by inserting a notice to the defendant of the nature of the demand, and that unless he appear and answer within the time specified, judgment by default will be taken against him.¹² But amendments can only be made by order of the court upon motion.¹³ Sheriffs have no right, after making a return, to amend it so as to affect rights which have already vested in third parties.¹⁴ But courts should exercise great liberality in allowing sheriffs to amend so as to make returns conform to facts, and to correct errors and mistakes.¹⁵

§ 3903. **Service of Summons in General.**—After the issuance of the summons by the clerk, the next step is to have it properly served, together with a copy of the complaint. Allowing an action to rest without serving the summons for two

¹ Tuttle v. Smith, 6 Abb. Pr. 329; S. C., 14 How. Pr. 395; approved, People v. Bennett, 6 Abb. Pr. 343; Luling v. Stanton, 8 Id. 378; Cobb v. Dunkin, 19 How. Pr. 164; reversing S. C., 17 Id. 97; Cook v. Pomeroy, 10 Id. 103, being overruled; see also Norton v. Cary, 14 Abb. Pr. 364; S. C., 23 How. Pr. 469.

² Diblee v. Mason, 1 Code R. 37.

³ Hyde Park v. Teller, 8 How. Pr. 504.

⁴ Croden v. Drew, 3 Duer, 654.

⁵ People v. Bennett, 5 Abb. Pr. 384; Commissioners of Albany v. Classon, 17 How. Pr. 193.

⁶ Goff v. Edgerton, 18 Abb. Pr. 381.

⁷ Montegriffo v. Musti, 1 Daly, 77.

⁸ Cal. Code C. P., sec. 407.

⁹ Foster v. Wood, 30 How. Pr. 284; S. C., 1 Abb. Pr., N. S., 150.

¹⁰ Cal. Code C. P., sec. 186.

¹¹ Cal. Code C. P., sec. 128; see also Id. 473.

¹² Pollock v. Hunt, 2 Cal. 194.

¹³ McCrane v. Moulton, 3 Sandf. 736; Allen v. Allen, 14 How. Pr. 248.

¹⁴ Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 Id. 25.

¹⁵ Gavitt v. Doub, 23 Cal. 79.

years and eight months after the summons is issued is such a want of diligence as to justify the court in dismissing the action.¹ If notice is given of a motion to dismiss an action for want of prosecution before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up, the entry of the default does not preclude the court from dismissing the action. The dismissal takes effect by relation back to the time of the service of the motion.² Most of the codes provide that when the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.³ So where S. and B. admitted "due service" of summons in an action against them and others, the court thereby acquired jurisdiction of them, and as to them the judgment was valid.⁴ Any writ or order and all other papers in any civil suit or proceeding may be served by telegraph in California.⁵ In Oregon, service of complaint and notice upon a defendant before the same are filed in the office of the clerk of the court is a good service.⁶

§ 3904. **Service, by Whom Made.**—The summons may be served by the sheriff of the county where the defendant is found, or by any other person, over the age of eighteen, not a party to the action.⁷ A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants.⁸ When the summons is served by the sheriff, it must be returned with his certificate of service, and of the service of a copy of the complaint where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served.⁹ The service of a summons by a person not a sheriff is "according to the course of the common law."¹⁰

§ 3905. **Service, upon Whom Made.**—The summons must be served by delivering a copy thereof to the defendant person-

¹ Grigsby v. Napa Co., 36 Cal. 585.

² Id.

³ Cal. Code C. P., sec. 414; see also Id., sec. 579.

⁴ Sharp v. Brunnings, 35 Cal. 528.

⁵ Cal. Code C. P., sec. 1017.

⁶ Keith v. Quinney, 1 Or. 364.

⁷ Cal. Code C. P., sec. 410.

⁸ Id.

⁹ Id.

¹⁰ Peck v. Strauss, 33 Cal. 683.

ally, except in the following instances: 1. In a suit against a corporation; 2. In a suit against a minor under the age of fourteen years; 3. In an action brought against an insane person. In the three excepted cases, the summons must be served on the person designated in the statute¹ instead of the person sued in the action. That is to say, if the suit is against a domestic corporation, by delivery of a copy of summons "to the president or other head of the corporation, secretary,² cashier, or managing agent thereof."³ Where service was made upon M. as president and C. as secretary, it was held sufficient without proof beyond the mere return that those persons were such officers;⁴ but service "upon James Street, one of the proprietors of the company," was held insufficient to give the court jurisdiction.⁵ If against a foreign corporation, or a non-resident joint-stock company, etc., doing business and having a managing or business agent, cashier, or secretary within this state, upon such cashier, agent, or secretary.⁶

If the action is against a county, city, or town, service should be made on the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof.⁷ Where there are two parties who make adverse claim to be officers of such corporation, the proper person to be served is the officer *de facto*, the one having possession.⁸ A baggage-master, or one who merely sells tickets, is not "managing agent" of a railroad company;⁹ but a person acting under power of attorney for an insurance company located elsewhere is a "managing agent."¹⁰ If against a minor under the age of fourteen years, residing within this state, service must be made on such minor personally, and also to his father, mother, guardian, or if there be none such within the state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.¹¹ The sheriff's certificate that he served the summons and complaint, by leaving a copy at the place of residence of the defendant, with a white person over the age of fourteen, who was residing with the fam-

¹ Cal. Code C. P., sec. 411.

² Gillig v. Independent G. & S. M. Co., 1 Nev. 247.

³ Aiken v. Quartz Rock Co., 6 Cal. 186.

⁴ Rowe v. Table Mt. W. Co., 10 Cal. 444.

⁵ O'Brien v. Shaw's Flat & T. C. Co., 10 Cal. 343.

⁶ Cal. Code C. P., sec. 411.

⁷ Id.

⁸ Berrian v. Method. Soc. in N. Y., 4 Abb. Pr. 424; see Rowe v. Table Mt. W. Co., 10 Cal. 444.

⁹ Flynn v. Hudson River R. R. Co., 6 How. Pr. 308.

¹⁰ Bain v. Globe Ins. Co., 9 How. Pr. 448. As to sufficiency of service of summons on a corporation by the laws of Oregon, see Laws of Oregon, 1866, p. 9.

¹¹ Cal. Code C. P., sec. 411.

ily, is sufficient service of summons in Oregon.¹ If against a person judicially declared to be of unsound mind, service must be made by delivering a copy to such person, and also to his guardian, if a guardian has been appointed.² In New York, service of summons on an insane person who has no committee must be by personal service on such person.³

The California code provides where two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such case being served on one or more of the associates.⁴ This provision had been upheld in the earlier California cases, but it was repudiated in a later case on the ground that the section was unconstitutional, as wanting in due process of law against the defendants not served.⁵

§ 3906. **Service, how Made.**—Under the California practice act, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statutes, the mode would be by showing the original under seal of the court, and delivering a copy.⁶ A summons can not be served upon defendant's attorney in fact.⁷ Putting the defendant in unknown possession of a summons disguised and enveloped is not a good service of summons.⁸ Where defendant refuses to accept the summons, service may be made by "laying it down at any appropriate place in his possession."⁹ But forcibly thrusting it upon him is improper.¹⁰ Where, however, a defendant refused to receive a process, it was held that laying it on his shoulder was good service.¹¹ If a copy of the summons, and a certified copy of the complaint, are personally delivered to the defendant, and issued from a court of general jurisdiction, the court thereby acquired jurisdiction of the person of the defendant. An irregularity in the mode of delivery is merely a ground of application to the court to set aside the summons.¹²

¹ Laws of Oregon of 1866, p. 98.

² Cal. Code C. P., sec. 411.

³ Heller v. Heller, 1 Code R., N. S., 390; S. C., 6 How. Pr. 194.

⁴ Cal. Code C. P., sec. 388; consult Mulliken v. Hull, 5 Cal. 246; Welch v. Kirkpatrick, 30 Id. 204; King v. Randlett, 33 Id. 322; Hammond v. People, 32 Ill. 446.

⁵ Tay v. Hawley, 39 Cal. 93.

⁶ Edmondson v. Mason, 16 Cal. 386; People v. Bernal, 43 Id. 385,

⁷ Drake v. Duvénick, 45 Cal. 455.

⁸ Bulkley v. Bulkley, 6 Abr. Pr. 307.

⁹ Davison v. Baker, 24 How. Pr. 39.

¹⁰ Id.

¹¹ Bell v. Vincent, 7 Dow. & Ry. 233.

¹² Peck v. Strauss, 33 Cal. 678. For the mode of transmitting summonses, and other writs, orders, or papers, by telegraph, for service in any place, and mode of service and return, see Cal. Code C. P. sec. 1017.

§ 3907. **Service by Publication.**—The statutes of all states provide how service of summons may be made by publication. In California this mode of service may be resorted to in four classes of cases only, to wit: 1. When defendant resides out of the state; 2. When defendant has departed from the state; 3. When defendant can not be found within the state, or when he conceals himself to avoid service; 4. When the defendant is a foreign corporation, having no managing or business agent, cashier, or secretary within the state. In such cases the court or judge may grant an order that the service be made by publication of summons.¹ The existence of either one of these conditions is not alone sufficient. In addition thereto, it must also appear by affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action.² It is settled that the statute providing the mode for acquiring jurisdiction of a defendant by the publication of summons, being in derogation of the common law, must be strictly followed in order to give the court jurisdiction over the person of the defendant.³ There is no provision that a judge may order a summons to issue. His only power is to order a summons, which has already issued, to be served in a particular manner.⁴ No presumption in favor of jurisdiction acquired by publication of summons will be indulged.⁵ The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state or absent therefrom must not be less than two months. If the place of residence of a non-resident or absent defendant is known, the order must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post-

¹ Cal. Code C. P., sec. 412.

² Id.

³ Ricketson v. Richardson, 26 Cal. 149; Jordan v. Giblin, 12 Id. 100; Forbes v. Hyde, 31 Id. 342; People v. Huber, 20 Id. 81; Cohn v. Kember, 47 Id. 145; Israel v. Arthur, 1 West Coast Rep. 286; Brown v. Tucker, Id. 489.

⁴ People v. Huber, 20 Cal. 81.

⁵ McMinn v. Whelan, 27 Cal. 309; Hallett v. Richters, 13 How. Pr. 43; Kendall v. Washburn, 14 Id. 380; Titus v. Relyea, 16 Id. 371; Cook v. Farren, 34 Barb. 95; S. C., 12 Abb. Pr. 359; 11 Id. 40; Wortman v. Wortman, 17 Abb. Pr. 66; Fiske v. Anderson, 33 Barb. 71; S. C., 12 Abb. Pr. 8.

office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication.¹ This procedure is constitutional only when the action is for the purpose of affecting the *status* of the defendant. If the object of the action is to subject the property of the defendant within the state to execution issued on a judgment against him, such property must be attached at the inception of the proceeding. After attachment, and a publication of summons in the manner provided by statute, the action becomes, in effect, a proceeding *in rem* against the property attached, and the judgment is *in rem* against such property, and not *in personam* against the defendant. A judgment rendered against a defendant not personally served with process, and whose property had not been attached, would be void for want of due process of law. This important doctrine has been recently established by the supreme court of the United States, and it is, of course, binding on all state courts, notwithstanding the statutes of many states, as in California, attempt to authorize a judgment against a person not served upon a mere publication of summons.²

§ 3908. **What is Sufficient Publication.**—A publication of summons weekly, against a non-resident defendant, commencing on the tenth day of January, and ending on the ninth day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the tenth of April.³ If the last day of the publication is in the same week in which the three months expire, the publication is sufficient, although this day is less than three months from the first day of publication.⁴ If some of the publications of a summons, including the last, are made on Sunday, in the regular issue of the paper, it does not vitiate the service.⁵ The month contemplated by the statute is a calendar and not a lunar month.⁶ When the time is important, courts will inquire into a day or fractional portion of a day.⁷ A judgment rendered against a party who is absent from the state upon publication of the summons thirty days only is void.⁸ A publication for seventy days is held to be a publication for ten weeks.⁹ A pub-

¹ Cal. Code C. P., sec. 413.

² *Pennoyer v. Neff*, 95 U. S. 728; *Hart v. Sansom*, 110 Id. 151; *Belcher v. Chambers*, 53 Cal. 635; *Smith v. Montoya*, 1 West Coast Rep. 152; *McKinney v. Collins*, 88 N. Y. 216.

³ *Savings and Loan Society v. Thompson*, 32 Cal. 347.

⁴ *Savings and Loan Society v. Thompson*, 32 Cal. 347.

⁵ *Id.*

⁶ *Id.*

⁷ *People v. Beatty*, 14 Cal. 566.

⁸ *Jordan v. Giblin*, 12 Cal. 100.

⁹ *People v. Gray*, 10 Abb. Pr. 468.

lication for thirty-nine days is held a publication for six weeks.¹ The month contemplated by the statute is a calendar-month, and not a lunar month.²

§ 3909. **Change in Summons Inadmissible.**—The summons must be published as it was when the order of publication was made.³ For example, when an order was made for the service of summons by publication, and a summons was issued, and a supplemental complaint was afterwards filed, and a summons issued thereon, it was held that the original action became merged in the action as supplemented, and the court did not acquire jurisdiction of the persons of absent defendants by publication of the original summons, but it was essential to serve by publication the summons issued on the supplemental complaint.⁴ Discrepancies of a purely literal character between the summons as issued and as published will be disregarded, where in sense and meaning they are identical.⁵

§ 3910. **Time to Appear after Publication.**—The California code of civil procedure⁶ further provides, in relation to service on non-residents by publication, that “the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.” It is held that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer.⁷

§ 3911. **Deposit in Post-office.**—In case of publication where the residence of a non-resident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence.⁸ Service of the summons upon infants, although under the age of fourteen years, should be made by depositing a summons and certified copy of the complaint in the post-office, directed to the infant, the same as to other defendants.⁹ The failure to deposit such, when directed to a minor, is not cured by the appearance of the mother in her own behalf.¹⁰ When an order for service by publication is obtained, if personal service out of the state is effected, it is unnecessary to proceed to make publication, and to deposit

¹ Olcott v. Robinson, 21 N. Y. 150.

² Sprague v. Norway, 31 Cal. 173; S. & L. Soc. v. Thompson, 32 Cal. 350.

³ McMinn v. Whelan, 27 Cal. 300.

⁴ Forbes v. Hyde, 31 Cal. 342; McMinn v. Whelan, 27 Id. 309.

⁵ Sharp v. Daugney, 33 Cal. 505.

⁶ Sec. 413.

⁷ Grewell v. Henderson, 5 Cal. 465.

⁸ Cal. Code C. P., sec. 413; Back v. Crussell, 2 Abb. Pr. 386; Van Wyck v. Hardy, 11 Id. 474; S. C., 20 How. Pr. 222; Victor Mill etc. Co. v. Justice's Court, 1 West Coast Rep. 299.

⁹ Gray v. Palmer, 9 Cal. 616.

¹⁰ Id.

a summons in the post-office.¹ In New York it is held that such personal service out of the state is only equivalent to mailing, and can have no greater effect.² A delay of four days in mailing, caused by waiting to have the papers printed, does not render the service irregular.³ Fifteen days' delay would make it irregular.⁴

§ 3912. **Service by Publication, when Conclusive.**—

The provisions of the statute prescribing the mode of acquiring jurisdiction of the person of the defendant by publication of the summons must be strictly pursued.⁵ If the code intended a judgment rendered against a defendant served by publication to be final under all circumstances, the constitutionality of such service might admit of very grave doubt. But the legislature did not so intend.⁶ The affidavit is only *prima facie* evidence of the facts, and if untrue, the defendant can at any time have the judgment set aside.⁷ If the defendant in fact conceals himself to avoid the service of process, he will not be heard to complain that he was not personally served.⁸ If jurisdiction of the person of a defendant was to be acquired by publication of the summons in lieu of personal service, the statutory mode must be strictly pursued; and if it appear that the court never had jurisdiction of the person of the defendant by reason of non-compliance with the provisions of the statute, the judgment entered in the case against such defendant will be pronounced a nullity, whether it come directly or collaterally in question.⁹ But a judgment rendered against a non-resident of the state who has not been personally served within the state, nor submitted himself to the jurisdiction of the court, can only be enforced within the state in which the judgment is rendered, and no personal liability will result therefrom which will be recognized beyond the state in which the action originated.¹⁰

¹ *Abrahams v. Mitchell*, 8 Abb. Pr. 123.

² *Fiske v. Anderson*, 12 Id. 8.

³ *Van Wyck v. Hardy*, 11 Id. 473.

⁴ *Back v. Crussell*, 2 Id. 386.

⁵ *Jordan v. Giblin*, 12 Cal. 100; *Cohn v. Kember*, 47 Id. 145; *Kendall v. Washburn*, 14 How. Pr. 380.

⁶ *Ware v. Robinson*, 9 Cal. 111.

⁷ Id.

⁸ Id.; see also *Swain v. Chase*, 12 Id. 285; *Ricketson v. Richardson*, 26 Id. 154; *Brady v. Seaman*, 30 Id. 617.

⁹ *McMinn v. Whelan*, 27 Cal. 312; see also *Forbes v. Hyde*, 31 Id. 347—

355; *McCauley v. Fulton*, 44 Id. 359; *Martin v. Parsons*, 59 Id. 502.

¹⁰ See *Wilson v. Graham*, 4 Wash. C. C. 53; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Holmes v. Holmes*, 4 Lans. 388; *Weil v. Lowenthal*, 10 Iowa, 578; *Harris v. Hardeman*, 14 How. U. S. 340; *Reber v. Wright*, 68 Pa. St. 471; *Freeman on Judgments*, sec. 564; *Pennoyer v. Neff*, 95 U. S. 728; *Hart v. Sansom*, 110 Id. 151; *Belcher v. Chambers*, 53 Cal. 635; *Smith v. Montoya*, 1 West Coast Rep. 152; *McKinney v. Collins*, 88 N. Y. 216.

CHAPTER II.

FORMS OF SUMMONS AND AFFIDAVITS OF SERVICE.

§ 3913. Summons in Action on Contract for Payment of Money Only.

Form No. 945.

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff,

against

C. D., Defendant.

Action brought in the superior court of the state of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said superior court.

The people of the state of California send greeting:

To, defendant: You are hereby required to appear in an action brought against you by the above-named plaintiff, in the superior court of the state of California, in and for the city of and county of, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served elsewhere, within thirty days.

The said action is brought to recover the sum of dollars, gold coin of the United States, due from defendant to plaintiff upon [a certain promissory note made by the defendant on the day of, 18.., to said plaintiff, for dollars, payable months after date], particularly described in the complaint; also for interest thereon, at the rate of per cent per month.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for said sum of dollars, in gold coin of the United States, interest and costs.

Given under my hand and the seal of the superior court of the state of California, in and for the city and county of, this day of, 18.. A. B., Clerk.

By C. D., Deputy Clerk.

E. F., Plaintiff's Attorney.

§ 3914. **The Same.**—If the recovery of money or damages be demanded, the amount thereof must be stated in the prayer of the complaint.¹ The relief granted to a plaintiff, if there be

¹ Cal. Code C. P., sec. 426, subd. 3.

no answer, can not exceed that which he shall have demanded in his complaint.¹ A notice in summons, that plaintiff will take judgment for the given sum, "with interest" thereon from a specified day, is sufficient.² In an action for work and labor done, and for the enforcement of a mechanic's lien, it is sufficient if the notice in the summons says "that plaintiff will take judgment for a certain sum specified therein." So held in the supreme court of Oregon.³ The judgment by default is fatally defective if the summons does not apprise the defendant that, upon his failure to appear and answer, the plaintiff will take judgment against him for a certain sum.⁴ Where no other notice was given than that judgment would be taken for a specified sum, the plaintiff can only take an ordinary judgment upon default for the money demanded.⁵

§ 3915. **The Same—Summons in Justice's Court.**

Form No. 246.

[STATE AND COUNTY.]	[COURT.]
A. B., Plaintiff, <i>against</i> C. D., Defendant.	}

The people of the state of California send greeting to, defendant. You are hereby required to appear in an action brought against you by the above-named plaintiff, in the justice's court of township, county of, state of California, and to answer before the justice at his office in the said township, the complaint filed therein, within five days (exclusive of the day of service) after the service on you of this summons—if served within the township in which this action is brought; or if served out of said township, but in said county, within ten days; or within twenty days if served elsewhere.

The said action is brought to recover [. dollars principal, and interest at the rate of per cent per month from the day of, 18.., upon a promissory note made by the defendant to the order of A. B., dated the day of, 18.., and payable months after date, and which note was indorsed and delivered to the plaintiff by said A. B.] And you are hereby notified that if you fail to so appear and answer said complaint, as above required, said plaintiff will take judgment

¹ Cal. Code C. P., sec. 580.

² People v. Woodlief, 2 Cal. 241; King v. Blood, 41 Id. 317; Swift v. De Witt, 3 How. Pr. 280.

³ Willamette Falls and M. Co. v. Riley, 1 Or. 183. As to when the summons must specify the amount,

see Commissioners of Albany v. Clason, 17 How. Pr. 193; Cemetery Board v. Teller, 8 Id. 504; Diblee v. Mason, 1 Code R. 37.

⁴ State v. Woodlief, 2 Cal. 241.

⁵ Porter v. Hermann, 8 Cal. 625.

against you for the sum of dollars, together with costs
 Make legal service and due return hereof.

Given under my hand this day of, 18..

Justice of the Peace of said Township.

Plaintiff's Attorney.

§ 3916. **Action in Justice's Court.**—An action in a justice's court is commenced by filing a complaint.¹ Parties may appear and act in person, or by attorney, and any person, except the constable by whom the summons or jury process was served, may act as attorney.² At any time after the complaint is filed, the defendant may, in writing or by appearing and pleading, waive the issuing of summons.³ The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest is indorsed on the summons forthwith;
2. In all other cases the summons must contain a direction that the defendant must appear and answer the complaint within five days, if the summons be served in the township in which the action is brought; within ten days, if served out of the township but in the county in which the action is brought; and within twenty days, if served elsewhere.⁴ If brought within the city and county of San Francisco, within three days after service.⁵

§ 3917. **Summons, Alias.**—If the summons is returned without being served upon one or all of the defendants, an *alias* summons may issue in the same form, except that the time for the appearance of the defendant may be fixed at a period not to exceed ninety days from its date.⁶ The justice may, within a year from the date of the filing of the complaint, issue as many *alias* summonses as may be demanded by the plaintiff.⁷

§ 3918. **Service of Summons.**—The summons may be served by a sheriff or constable of any of the counties of this state, but when it is to be served out of the county, the summons shall have attached to it a certificate of the county clerk that the person issuing the same was an acting justice of the peace at the date of the summons. A justice's summons may

¹ Cal. Code C. P., sec. 839.

² Id., sec. 842.

³ Id., sec. 841. As to appearance of infants, see Id., sec. 843. For what the summons must contain, and to whom directed, see Id., sec. 844.

⁴ Cal. Code C. P., sec. 845.

⁵ Stat. 1871-2, p. 94. As to the practice in justices' courts in the city

and county of San Francisco, see Harston's Practice, p. 56, notes to sec 119.

⁶ Cal. Code C. P., sec. 846.

⁷ Id., sec. 847. As to when the summons may be served out of the county in which the action is brought, see Id., sec. 848.

also be served by any male resident over the age of twenty-one years, not a party to the suit, within the county where the action is brought, and must be served and returned as provided by title 5, part 2 (secs. 405-416), California code of civil procedure. Summons may also be served by publication under the same circumstances and in the same manner as a superior court summons.¹

§ 3919. Summons in Action to Foreclose Mortgage.

Form No. 947.

[TITLE AS IN No. 945.]

The people of the state of California send greeting to, defendant. You are hereby required to appear in an action brought against you by the above-named plaintiff, in the superior court of the state of California, in and for the, county of, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or if served elsewhere, within thirty days.

The said action is brought to obtain a decree of this court for the foreclosure of certain mortgage described in the said complaint, and executed by the said on the day of, 18.., to secure the payment of a certain, that the premises conveyed by said mortgage may be sold, and the proceeds applied to the payment of said; and in case such proceeds are not sufficient to pay the same, then to obtain an execution against said for the balance remaining due, and also that the said defendant, and all persons claiming by, through, or under may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in and to said mortgaged premises, and for other and further relief, as will more fully appear by reference to the complaint on file herein.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

[Attestation, date, and signature as in No. 945.]

§ 3920. Actions for Specific Relief.—A summons for relief is the proper form in an action in which a part of the relief sought is unliquidated damages for the breach of an agreement to carry on business;² or for breach of agreement to

¹ Cal. Code C. P., sec. 849.

² Tuttle v. Smith, 6 Abb. Pr. 329; S. C., 14 How. Pr. 395; but see Hart-

man v. Williams, 4 Cal. 225; Dimick v. Campbell, 31 Id. 239; Emeric v. Tams, 6 Id. 156.

convey real property;¹ or in any action on undertaking of bail;² or on a constable's bond.³ So in an action for breach of warranty;⁴ so in actions for conversion;⁵ so in actions for an account of moneys collected.⁶ Where an allegation of a mistake on a former accounting, and a demand for a new accounting, is contained in the complaint, the summons is properly for relief.⁷ Against a carrier for loss of goods;⁸ or for breach of contract to transport goods;⁹ for unliquidated damages generally;¹⁰ for liquidated and unliquidated damages.¹¹ In actions for fraud, the summons must apprise the defendant that on failure to answer judgment will be taken against him for the fraud. A mere notice that a money judgment will be taken against him will not support a judgment for fraud;¹² or to open an account on the ground of mistake.¹³ So for damages for death by wrongful act;¹⁴ so on breach of contract to convey;¹⁵ for breach of contract to marry.¹⁶

§ 3921. **Alias Summons.**—The clerk of the superior court is authorized, on demand of the plaintiff, to issue an *alias* summons after the expiration of the year during which the original must be issued. If the plaintiff is guilty of laches, by failing to serve either the original or the *alias*, the defendant may move to quash.¹⁷

§ 3922. **Redelivery and Service after Return.**—After a summons has been served on some of the defendants, and returned, the court may order it delivered to the plaintiff for further service on other defendants in the same or another county.¹⁸ A redelivery of the summons without an order of the

¹ Johnson v. Paul, 6 Abb. Pr. 335, note; S. C., 14 How. Pr. 454.

² Kelsey v. Covert, 6 Abb. Pr. 336; S. C., 15 How. Pr. 92; Levy v. Nicholas, 15 Abb. Pr. 63, note.

³ Mayor of New York v. Lyons, 1 Daly, 296; 24 How. Pr. 280.

⁴ Dunn v. Bloomingdale, 6 Abb. Pr. 340, note; S. C., 14 How. Pr. 474.

⁵ Voorhies v. Scofield, 7 How. Pr. 51; Ridder v. Whitlock, 12 Id. 208.

⁶ West v. Brewster, 1 Duer, 647; see Cal. Code C. P., sec. 407.

⁷ McDougall v. Cooper, 31 N. Y. 498.

⁸ Hewitt v. Howell, 8 How. Pr. 346; Campbell v. Perkins, 4 Seld. 438.

⁹ Luling v. Stanton, 2 Hilt. 538.

¹⁰ Croden v. Drew, 3 Duer, 654; People v. Bennett, 6 Abb. Pr. 343; Salters v. Ralph, 15 Id. 273; Cobb v. Dunkin, 19 How. Pr. 164; Luling v. Stanton, 8 Abb. Pr. 378.

¹¹ Norton v. Cary, 14 Abb. Pr. 364; S. C., 23 How. Pr. 469; Hartshorn v. Newman, 15 Abb. Pr. 63; Hemson v. Decker, 29 How. Pr. 385.

¹² Porter v. Hermann, 8 Cal. 619; Hartshorn v. Newman, 15 Abb. Pr. 63; Travis v. Tobias, 7 How. Pr. 90; Field v. Morse, Id. 12.

¹³ McDougall v. Cooper, 31 N. Y. 498.

¹⁴ Doedt v. Wiswell, 15 How. Pr. 128.

¹⁵ Johnson v. Paul, 14 How. Pr. 454.

¹⁶ Davis v. Bates, 6 Abb. Pr. 15; McDonald v. Walsh, 5 Id. 68; McNeff v. Short, 14 How. Pr. 463. The cases of Williams v. Miller, 4 Id. 94; 2 Code R. 55; and Leopold v. Poppenheimer, 1 Id. 39, overruled.

¹⁷ Dunker v. Lutz, 48 Cal. 466.

¹⁸ Hancock v. Preuss, 40 Cal. 572.

court is an irregularity of which the opposite party may avail himself by direct attack; but such irregularity will not render the service void.¹

§ 3923. **Return of Sheriff on Summons—General Form.**

Form No. 948.

[STATE AND COUNTY.]

[COURT.]

Office of the Sheriff, City and }
County of

I hereby certify that I received the within summons on the day of, 18.., and personally served the same on the day of, 18.., by delivering to [names], said defendants personally, in the city and county of, a copy of said summons attached to a true copy of the complaint in the said action therein named.

G. H., Sheriff.

By J. K., Deputy Sheriff.

Dated at, this day of, 18..

§ 3924. **Service by Sheriff, Effect of.**—In a collateral attack on a judgment the return of the sheriff that he served a copy of the summons will be held equivalent to a return that he served a copy certified by the clerk.² Where judgment of foreclosure was obtained on a defective service, and the premises sold under the judgment to a party who was, at the time of such purchase, cognizant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside.³ Courts should presume that the sheriff served all processes within his jurisdiction, where no place of service is stated.⁴ Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else.⁵ A sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion.⁶ Personal service of writs and process can only be made by delivering a copy to the party upon whom the service is required.⁷ In the absence of the statute it will be necessary to show the original with the seal of the court, and also to deliver a copy.⁸ A summons can not be served on defendant's attorney in fact.⁹ In making service of a summons, and in the return of such service, the provisions of the statute must be

¹ *Hancock v. Preuss*, 40 Cal. 572.

² *Brown v. Lawson*, 51 Cal. 615.

³ *McMillan v. Reynolds*, 11 Cal. 372.

⁴ *Crane v. Brannan*, 3 Cal. 192.

⁵ *Curtis v. Herrick*, 14 Cal. 117.

⁶ *Egery v. Buchanan*, 5 Cal. 56.

⁷ *Edmondson v. Mason*, 16 Cal. 388.

⁸ *Id.*

⁹ *Drake v. Duvenick*, 45 Cal. 455.

shown to have been substantially followed by the officer; otherwise the proceedings can not be supported upon a direct appeal.¹ A description in a sheriff's return of city lots by numbers referring to the official map is sufficient.²

§ 3925. **Service by Deputy.**—The general rule of the common law is that officers who exercise judicial functions can not act by deputy, but those who exercise merely ministerial functions may, without express authority to that effect.³ In the absence of statutory provisions as to the appointment of deputies by constables, the common-law rule applies, and constables may act by deputy in the exercise of their ministerial functions.⁴ Courts can not know an under-officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal.⁵ Where a summons was served by the deputy sheriff, and returned, with the following signature to the return: "Elijah F. Cole, D. S.," and judgment was rendered by default, it was held that the judgment was null and void; the return should have been made in the name of the sheriff by the deputy.⁶

§ 3926. **On a Minor.**—If a father sues his infant son, residing with him, and the statute requires the summons to be served personally on the infant and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service.⁷

§ 3927. **On Corporations.**—Where the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company," it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was president or head of the corporation, or secretary, cashier, or managing agent thereof.⁸ A sheriff's return that he served the summons on the president and secretary of the company is *prima facie* evidence that the persons named in the return were such officers.⁹

§ 3928. **On Partners.**—The return of a sheriff that he served the summons on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate.¹⁰ Where the summons was issued against Adams & Co., and served on C. B. Macy, and

¹ People v. Bernal, 43 Cal. 385.

² Welch v. Sullivan, 8 Cal. 186.

³ Jobson v. Fennell, 35 Cal. 711.

⁴ Id.

⁵ Joyce v. Joyce, 5 Cal. 449.

⁶ Rowley v. Howard, 23 Cal. 401.

⁷ Brown v. Lawson, 51 Cal. 615.

⁸ O'Brien v. Shaw's Flat and Tuolumne Canal Co., 10 Cal. 343.

⁹ Rowe v. Table Mt. Water Co., 10 Cal. 441.

¹⁰ Willson v. Spring Hill Quartz Mining Co., 10 Cal. 445.

nothing appeared to connect Macy with Adams & Co., judgment by default could not be sustained.¹

§ 3929. **Time and Place.**—In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.² The only object of the designation of the place where service is served is to determine the period within which the answer must be filed, or when default may be taken.³ Where the evidence of place of service is insufficient, advantage of it should be taken, either by appeal or on motion to vacate the judgment.⁴ But where the return shows that two defendants were served in the same county, and that on one of them a copy of the summons only was served, it will be presumed that they were both residents of such county.⁵

§ 3930. **Where One Defendant was not Found.**

Form No. 949.

I further certify that I have made diligent search for the defendant A. B., named in said summons, but have been unable to find him within my said county.

§ 3931. **Affidavit of Service of Summons upon Several Defendants.**

Form No. 950.

[TITLE.]

State of California, }
City and County of } ss.

A. B., being duly sworn, deposes and says:

I received the annexed summons in the above-entitled cause on the day of, 18.., and on the day of, 18.., personally served the same, by delivering to C. D., one of said defendants, personally, in the city and county of San Francisco, a copy of said summons, attached to a copy of the complaint in the above-entitled cause, and by leaving the same with him, and also, on the day of, 18.., by delivering to E. F., one of said defendants, personally, in the city and county aforesaid, a copy of said summons, and also, personally, on the day of, 18.., by delivering to G. H., one of said defendants, in the city and county of San Francisco, a copy of said summons; and I further depose that each of said defendants was, on said mentioned days, resident of the said city and county of San Francisco; and I further depose that I am, and was at all the times hereinbefore named, a

¹ Adams v. Town, 3 Cal. 247.

⁴ Pico v. Suñol, 6 Cal. 224.

² Cal. Code C. P., sec. 415; N. Y. Code, ed. 1877, sec. 434.

⁵ Pellier v. Gillespie, 4 West Coast Rep. 500.

³ Alterson v. Bell, 9 Cal. 315.

citizen of the United States, over eighteen years of age, and not a party to the above-entitled action.

Subscribed and sworn to, etc.

§ 3932. **Affidavit of Service of Summons—Another Form.**

Form No. 951.

[TITLE.]

State of California,
..... County of } ss.

....., being duly sworn, deposes and says that he is, and at the several times hereinsfter mentioned was, a citizen of the United States, above the age of eighteen years, and not a party to the above-entitled action; that he received the annexed summons in said action on the day of, A. D. 18.., and personally served the same upon, the above-named defendant, on the day of, A. D. 18.., by delivering to, the said defendant, personally, in the, county of, a copy of said summons, attached to a copy of the complaint in said action.

[JURAT.]

[SIGNATURE.]

§ 3933. **What the Affidavit must Show.**—The proof of personal service, if made by an officer, is by his affidavit or certificate, setting forth the mode, time, and place of such service; if made by a citizen, then by his affidavit setting forth said facts, and in addition the facts constituting his said qualifications. Proof of constructive service, or service by publication, is by the affidavit of the printer, his foreman, or principal clerk, setting forth the fact where and how long the publication of summons has been made, and where a deposit in the post-office had been ordered, then an affidavit showing such deposit.¹ The affidavit must show affirmatively compliance with all the requirements of law.² If the affidavit of service of summons states the county in which the service was made, and defendant makes default, it will be presumed that he was a resident of the county where service was made.³ And if the affidavit state the facts constituting affiant a competent witness, it is sufficient without stating that he is competent.⁴ The affidavit must state that the one making the service (if not the sheriff) was at the time of service of the requisite age. An allegation that he was of such age at the time of making proof of service is not enough, and will not sustain a judgment by default.⁵

¹ Hahn v. Kelly, 34 Cal. 391.

² McMillan v. Reynolds, 11 Cal. 378.

³ Calderwood v. Brooks, 28 Cal. 151;
Pellier v. Gillespie, 4 West Coast Rep.
500.

⁴ Dimick v. Campbell, 31 Cal. 238.

⁵ Lyons v. Cunningham, 4 West Coast
Rep. 294; Maynard v. MacCrellich, 57
Cal. 355; Howard v. Galloway, 60 Id.
10; Weill v. Bent, 9 P. C. L. J. 626.

§ 3934. **Affidavit for Publication of Summons.***Form No. 952.*

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action. The complaint in said action was duly filed with the clerk of this court on the day of, 18.., and summons thereupon issued; and the said action is brought for the purpose of [state the purpose of the action].

II. The defendant, C. D., last resided at the city and county of, but he has departed from this state, and now resides at, in the county of, state of Nevada. [Or that the last known place of residence of said defendant, C. D., was at, within this state, but that he removed thence on or about the day of, 18.., and his residence at this time can not with due diligence be ascertained. I have diligently made such inquiry of and, his former neighbors and acquaintances, and of, his wife, and of his father and brother, who reside at the said city and county of, and I am informed by them that they are ignorant of defendant's residence, but that he is not, as they believe, within this state.]

III. That a summons was duly issued out of this court to the sheriff of the city and county of, with directions to said sheriff to serve the same upon said defendant, and the said sheriff has returned the same to the clerk of this court, with his return thereon indorsed, to the effect that the said defendant could not be found in his county [or state particulars of the return].

IV. I have fully and fairly stated the facts of the case to E. F., of No. street, in the city of San Francisco, my counsel, and I am by him informed, and I verily believe, that I have a good cause of action in this suit against the said defendant, as will fully appear by my verified complaint filed herein, to which reference is hereby made, and the said defendant, C. D., is a necessary and proper party defendant thereto, as I am advised by my said counsel after such statement made, as afore-said, and as I verily believe.

V. Personal service of said summons can not be made on the said defendant, and I therefore demand an order that service of the same may be made by publication.

A. B.

§ 3935. **Affidavit Essential.**—Before jurisdiction of a defendant can be acquired by publication of summons, it must appear by affidavit either that the defendant resides out of the state, or has departed from the state, or can not, after due diligence, be found within the state, or that he conceals himself to avoid the service of summons; and in addition thereto it must also appear by affidavit that a cause exists against the defendant, or that he is a necessary or proper party.¹

§ 3936. **Affidavit, What must Show.**—The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and if known, the residence must be stated.² Nor is it sufficient merely to repeat the language or substance of the statute.³ An affidavit in such case must state facts which show that due diligence to find the defendant has been used, and it must also appear therefrom that the diligence has not been rewarded with a discovery.⁴ Where the affidavit for publication of summons presents some evidence tending to prove each jurisdictional fact, but of a character clearly too inconclusive to justify an order of publication, the order is erroneous, and the judgment will be reversed on appeal; but it is not void.⁵ If there is a total want of evidence upon which to base the order, the judgment is void.⁶ In the former case the judgment can not be attacked collaterally, but only on appeal.⁷ Facts should be set out in an affidavit for an order to publish summons, and not a general expression of opinion or belief that an ultimate jurisdictional fact exists, without the probative facts upon which such opinion or belief is founded.⁸ An affidavit to obtain an order for publication of summons, which states that the deponent “has a good cause of action in this suit against the said defendant, and that he is a proper party defendant thereto, as he verily believes,” does not state any fact tending to show a cause of action, and an order and publication based on it are void.⁹ An affidavit for publication

¹ Braly v. Seaman, 30 Cal. 610; see Cal. Code C. P., sec. 412.

² Ricketson v. Richardson, 26 Cal. 149; Braly v. Seaman, 30 Id. 610; Hyatt v. Wagenright, 18 How. Pr. 248; Cook v. Farren, 34 Barb. 95; S. C., 12 Abb. Pr. 359; S. C., 11 Id. 40; Victor M. etc. Co. v. Justice's Court, 1 West Coast Rep. 299.

³ Ricketson v. Richardson, 26 Cal. 149.

⁴ Braly v. Seaman, 30 Cal. 610; Forbes v. Hyde, 31 Id. 342; Israel v. Arthur, 1 West Coast Rep. 286; Vic-

tor M. etc. Co. v. Justice's Court, Id. 299.

⁵ Forbes v. Hyde, 31 Cal. 342.

⁶ Id.

⁷ Id.; see also McCauley v. Fulton, 44 Cal. 359; Martin v. Parson, 50 Id. 202.

⁸ Forbes v. Hyde, 31 Cal. 342; Collins v. Ryan, 32 Barb. 647; Roche v. Ward, 7 How. Pr. 416; Towsley v. McDonald, 32 Barb. 604.

⁹ Forbes v. Hyde, 31 Cal. 342; Sharp v. Daugney, 33 Id. 515; Hahn v. Kelly, 34 Id. 391.

on the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of F., who is an intimate friend of defendant, as to his whereabouts; that F. was unable to inform him; and that plaintiff did not know where defendant could be found within the state, was held insufficient.¹ It is not sufficient to state generally, in such affidavit, that after due diligence the defendant can not be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated.² It must be proved that the person to be served can not, after due diligence, be found in the state.³ Where the attorney of record makes an affidavit that diligent search has been made for the defendant, and that he conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication.⁴

§ 3937. **On Infant.**—The requirements of the statute being positive, that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of the state, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication.⁵ But the court will presume, unless the contrary appears, that minors were over the age of fourteen years, in which case no service is required on the mother, or other person having them in charge, in order to sustain a service by publication.⁶

§ 3938. **Order for Publication of Summons.**

Form No. 953.

[TITLE.]

Upon reading and filing the affidavit of A. B., and it satisfactorily appearing therefrom to me, the judge of the superior court of the state of, in and for the county of, that the defendant C. D. resides out of this state, and can not, after due diligence, be found therein [or has departed from the state; or can not, after due diligence, be found within the state;

¹ Swain v. Chase, 12 Cal. 283.

² Ricketson v. Richardson, 26 Cal. 152; Warren v. Tiffany, 9 Abb Pr. 66; 17 How. Pr. 106.

³ Hurlburt v. Hope Mut. Ins. Co., 4 How. Pr. 278; Wortman v. Wortman, 17 Abb. Pr. 66; Irving Savings Institute v. Hardman, Id. 67, note.

⁴ Anderson v. Parker, 6 Cal. 201;

Towsley v. McDonald, 32 Barb. 604.

As to insufficiency of affidavit on these points, see Swain v. Chase, 12 Cal. 283; Godkin v. Redgate, 1 Croup. & J. 401.

⁵ Gray v. Palmer, 9 Cal. 616.

⁶ Emeric v. Alvarado, 1 West Coast Rep. 708.

or conceals himself to avoid the service of summons, as the case may be], and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein, and against the said defendant, and that the said defendant C. D. is a necessary and proper party defendant thereto; and it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same can not be made upon the said defendant for the reasons hereinbefore contained, and by the said affidavit made to appear: on motion of E. F., esq., attorney for the plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the, a newspaper published at, hereby designated as the newspaper most likely to give notice to said defendant; that such publication be made at least once a week for two months.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at the city of, in the county of, in the state of, it is ordered that a copy of the summons and a copy of the complaint in this action be forthwith deposited in the post-office, post-paid, directed to the said defendant, at his said place of residence.

J. D., Judge of the Superior Court
of the County of, State
of

[DATE.]

§ 3939. **Order, What must State.**—The order must state the facts proved by the affidavit upon which it is based.¹ It is not sufficient for the order to state generally that the defendant resides out of the state, or can not after due diligence be found within the state, or that a cause of action exists against the defendant.² Where, after complaint filed, and before any summons was issued, an order was obtained from the judge that “summons do issue,” and that it be published, and without any further order summons was subsequently issued and published, it was held that the attempt thus to acquire jurisdiction of the defendant was ineffectual, and that a judgment rendered against him by default, without any other service of process, was void.³ The question of the sufficiency of an affidavit and order for publication of summons may be raised by motion made in the suit, or by an appeal supported by a statement.⁴ An order to pub-

¹ Ricketson v. Richardson, 26 Cal. 149.

² Id. 152.

³ People v. Huber, 20 Cal. 81.

⁴ Sharp v. Daugney, 33 Cal. 505.

lish a summons made in advance of the issuance of the summons is a nullity.¹ The judge has no power to order a summons to issue, but only to order a summons already issued to be served in a special manner.² The court acts judicially in granting the order, and can know nothing about the facts upon which it is granted, except from the affidavit.³ An order for the publication of a summons, which presupposes that the debtor is a resident of the state, but has departed therefrom, or keeps himself concealed therein, must direct a copy of the summons and complaint to be deposited in the post-office, directed to the defendant at his place of residence, though it appear from the affidavit that he has departed therefrom.⁴

§ 3940. **Affidavit of Publication.**⁵

Form No. 954.

[TITLE.]

[VENUE.]

A. B., of said county, being duly sworn, deposes and says as follows:

I. I am a citizen of the United States, and at all the times hereinafter mentioned was over eighteen years of age, and am not a party to the above-entitled action.

II. I am the principal clerk and book-keeper in the office of the daily, a newspaper printed and published in the city and county of [or printer, foreman, or principal clerk].

III. The summons of which the annexed is a printed copy was published in said newspaper at least once each week for months, commencing on the day of, 18.., and ending on the day of, 18..

[JURAT.]

[SIGNATURE.]

§ 3941. **By Whom Made, and What to Contain.**—Where the affidavit was made by a publisher and proprietor, and not by the printer, foreman, or chief clerk, it was held sufficient, as being within the spirit of the statute.⁶ When service is had by the publication, proof thereof can only be made by affidavit of the printer, his foreman or clerk; and the affidavit

¹ People v. Huber, 20 Cal. 81.

² McMinn v. Whelan, 27 Cal. 304; Forbes v. Hyde, 31 Id. 342.

³ Ricketson v. Richardson, 26 Cal. 149.

⁴ Towsley v. McDonald, 32 Barb. 604.

⁵ It will be observed that many of the affidavits herein are made in the first person. This mode is the uni-

versal English practice, and is recommended by the code commissioners of the state of New York, and I here take the liberty of recommending it to the profession, as it certainly appeals more directly to a man's conscience than if made in the third person.

⁶ Sharp v. Daugney, 33 Cal. 505.

should state that the person taking the same holds one of these positions.¹ And there being but one clerk in the office of the newspaper, and the affidavit describing him as principal clerk, the affidavit was held sufficient.² If the affidavit does not show facts sufficient to give jurisdiction, but the judgment in the recitals supplies those facts, or recites that service had been had upon the defendant, the judgment will control. It will be presumed that other evidence than that contained in the judgment roll was made. The recital imports absolute verity.³ An affidavit commencing, "A. B., principal clerk, etc., being sworn, deposes," etc., was held insufficient.⁴ He should swear that he is principal clerk in direct and positive terms.

§ 3942. Affidavit of Service by Mail of Summons and Copy of Complaint.

Form No. 955.

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

I. I am, and at the several times hereinafter mentioned was, a citizen of the United States, over eighteen years of age, and am not a party to the above-entitled action.

II. On the day of, 18.., the complaint in the said action was filed, and afterwards, to wit, on the day of, 18.., an order was made by the court for the publication of the summons in the said action, and also a further order that a copy of said complaint and a copy of the said summons should be forthwith deposited in the post-office, and directed to the defendant in said action, at his place of residence, to wit, at the city of, in the county of, state of; that afterwards, to wit, on the day of, 18.., and in pursuance of said order of the court in the premises heretofore made, I deposited in the post-office at the city of, a copy of the said summons, attached to a copy of the said complaint, directed to C. D., the said defendant, at the city of, in the county of, state of, the place of his residence as aforesaid, and prepaid the postage thereon.

[JURAT.]

[SIGNATURE.]

§ 3943. Statement in Affidavit.—The affidavit of deposit of summons in post-office need not state that the deposit was made by a white male citizen, or that the affiant is such citizen.

¹ Steinbach v. Leese, 27 Cal. 295.

² Gray v. Palmer, 9 Cal. 616.

³ Hahn v. Kelly, 34 Cal. 391.

⁴ Steinbach v. Leese, 27 Cal. 295.

It is sufficient if the deposit and affidavit are made by a human being;¹ nor is it necessary to state that there is a communication by mail between the place of deposit and the place to which the packet was addressed, nor that the post-office was a United States post-office.²

§ 3944. **Admission of Service.**

Form No. 956.

[TITLE.]

I admit [due and] personal service of the within
upon me, made this day of, 18.., at

[SIGNATURE.]

§ 3945. **Date.**—Where defendant's attorneys accepted service of summons, but attached no date thereto, the date of the return by the sheriff was held to be the true date of the service. When the place where the writ is served is not stated, the court should assume that it was served within the jurisdiction of the officer to whom it was directed.³

§ 3946. **Judicial Notice.**—Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties; in the absence of such evidence, the court can not notice them.⁴

§ 3947. **Must be in Writing.**—An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient.⁵

¹ Sharp v. Daugney, 33 Cal. 505.

² Id.

³ Crane v. Brannan, 3 Cal. 192.

⁴ Alderson v. Bell, 9 Cal. 315.

⁵ Montgomery v. Tutt, 11 Cal. 307.

CHAPTER III.

APPEARANCE.

§ 3948. **In-General.**—It is provided by statute that after the filing of the complaint a defendant in the action may appear, answer, or demur, whether the summons has been issued or not; and such appearance, answer, or demurrer shall be deemed a waiver of summons.¹ A voluntary appearance by a defendant gives jurisdiction without issuance of summons,² as the only object of the summons is to bring a party into court, and if that object is obtained without issuance or service, there can be no injury to the defendant.³ So a guardian may waive process, and enter his appearance for his ward.⁴ Appearance covers all defects and irregularities in process, and the want of service.⁵ A general appearance not only waives defects in a writ or summons, but gives jurisdiction over the person in cases where the writ was void.⁶

But appearance does not cure a substantial defect in the writ of error (such as naming a return day for the writ), or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal.⁷ Nor does it preclude a party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for want of a citation, or for mere irregularity in its service.⁸ A notice given by an attorney to plaintiff's attorney, that the defendant will move before a court commissioner that an attachment issued in the case be dissolved, does not constitute an appearance in the action.⁹ So when a defendant appears for the purpose of taking advantage of irregular summons by a motion to dis-

¹ Cal. Code C. P., sec. 406; Code of Oregon, sec. 59; Wash. T., sec. 40; Arizona, sec. 22; Idaho, sec. 22; N. Y. Code, sec. 127; Swan's Ohio Pl. 22.

² Cal. Code C. P., sec. 416; Hayes v. Shattuck, 21 Cal. 51; Carrington v. Bents, 1 McLean, 174; Shields v. Thomas, 18 How. U. S. 253.

³ Smith v. Curtis, 7 Cal. 587.

⁴ Sprague v. Litherberry, 4 McLean, 412.

⁵ Caswall v. Martin, 2 Stra. 1072; Wood v. Lide, 4 Cranch, 180; Sands v. Knox, 3 Id. 498; McCoy v. Lemons, Hempst. 216; see Pollard v. Dwight, 4 Cranch, 421; The Merino, 9 Wheat.

391; Flanders v. Aetna Ins. Co., 3 Mass. 158; Segoe v. Thomas, 3 Blatchf. 11; Harrison v. Rowan, 1 Pet. C. C. 489. See, as to appearance in case of foreign attachment, Toland v. Sprague, 12 Pet. 300. See, in case of an absent defendant, Shields v. Thomas, 18 How. Pr. 253.

⁶ State v. McCullough, 3 Nev. 202; Farrar v. United States, 3 Pet. 459; Pollard v. Dwight, 4 Cranch, 421.

⁷ Carroll v. Dorsey, 20 How. U. S. 204.

⁸ United States v. Yates, 6 How. U. S. 605.

⁹ Glidden v. Packard, 28 Cal. 649.

miss, it does not amount to a waiver of his rights so as to cure the defect.¹ An answer does not waive the benefit of an exception by defendant to an order denying a motion by him to set aside the service of a summons.² A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance, or when an attorney gives notice of appearance for him.³ A notice signed by attorneys and filed with the clerk after a complaint has been filed, stating that "we have been retained by and hereby appear for the above-named defendant in the above-entitled cause," is a sufficient appearance of the defendant, and is a waiver of summons.⁴ The filing of a general demurrer is an appearance, and cures any defect in service of process.⁵ A defendant can not appear in an action, so as to give the court jurisdiction of his person, except by answering or demurring, or giving plaintiff written notice that he appears.⁶ Where the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties served with process.⁷ An action was brought in a court, the judge of which was disqualified from hearing the case on account of relationship to one of the defendants. Some of the other defendants not appearing, the clerk entered a default against them. It was held that the entry of the default, being a ministerial act, was rightly made.⁸ If it does not appear affirmatively upon the face of a record of a court of general jurisdiction that the court had jurisdiction of the defendant, that fact will be presumed, unless the record shows affirmatively that no jurisdiction was acquired.⁹ And it can be shown only by the record.¹⁰

§ 3949. Notice of Appearance.

Form No. 957.

State of California, }
City and County of..... } In the Superior Court.

A. B., Plaintiff,
- against
C. D., Defendant. }

E. F., Esq., Attorney for Plaintiff A. B.—Sir: Please take

¹ Deidesheimer v. Brown, 8 Cal. 339; Lyman v. Milton, 44 Id. 631; Lander v. Fleming, 47 Id. 614.

² Kent v. West, 50 Cal. 185.

³ Cal. Code C. P., sec. 1014.

⁴ Dyer v. North, 44 Cal. 157. As to authority of attorney to bind his client, see Cal. Code C. P., sec. 283.

⁵ Williams v. Miller, Sup. Ct. Wash. Ter. 1864, p. 106.

⁶ Steinbach v. Leese, 27 Cal. 297.

⁷ Chester v. Miller, 13 Cal. 558; Kelly v. Van Austin, 17 Id. 564; Hinchfield v. Franklin, 6 Id. 607.

⁸ The People v. De Carrillo, 35 Cal. 37.

⁹ Carpentier v. City of Oakland, 30 Cal. 439.

¹⁰ Id.

notice that the defendant C. D. hereby appears in this action by the undersigned, his attorney.

G. H.,

[DATE.]

Attorney for Defendant.

§ 3950. **Appearance.**—A party to an action may appear in his own person or by attorney, but he can not do both; and if he appears by attorney, he can not assume the control of the case.¹ While an attorney of record remains such, his right to manage and control the action can not be questioned by the opposite party.² Courts will not presume the appearance of a defendant not regularly served, merely because a continuance was ordered after default taken.³ Where counsel expressly appears for certain defendants in an action, his signature to papers in the case after that time as attorney for the defendants will be construed as limited to those for whom he expressly appeared.⁴ Where plaintiff amended his complaint by adding two new parties defendant, and these defendants filed an acknowledgment of “service of summons and a copy of the complaint,” and “consent that the decree herein prayed for by plaintiff be entered,” it was held a sufficient appearance to authorize a decree against them.⁵ An appearance in the probate court of an executor, in proceedings relating to an estate, is a waiver of citation.⁶ An appearance is a proceeding in court, and must constitute a part of the record.⁷ The appearance of a defendant who has not been served with notice, to testify as a witness, does not constitute an appearance bringing him within the jurisdiction of the court as a party.⁸

§ 3951. **Appearance by Attorney.**—Under the California practice, at any time after the commencement of an action any one or all of the defendants may appear by attorney without service of summons, and the defendant so appearing must plead to the action within the same time thereafter as he would had the summons been served upon him. An appearance entered by attorney, whether authorized or not, is a good and sufficient appearance to bind the party.⁹ Appearance by attorney, whether authorized or not, at common law, and by express

¹ Board of Commissioners v. Younger, 29 Cal. 147.

² Id.

³ Norblett v. Farwell, 38 Cal. 155.

⁴ Spangel v. Dellinger, 42 Cal. 148.

⁵ Foote v. Richmond, 42 Cal. 439.

⁶ Estate of Johnson v. Tyson, 45 Cal. 257.

⁷ McCormack v. First Nat. Bank of Greensburgh, 53 Ind. 466.

⁸ Nixon v. Downey, 42 Iowa, 78; see also Cal. Code C. P., secs. 406, 416, 1014.

⁹ Suydam v. Pitcher, 4 Cal. 280; Holmes v. Rogers, 13 Id. 191; Turner v. Caruthers, 17 Id. 431.

letter of our statute, is a waiver of service;¹ and a waiver of all defects in summons or previous proceedings;² and of all irregularity in the original process.³ If an attorney appears for a defendant in a court of general jurisdiction, this appearance gives the court jurisdiction of the person of defendant; and if the attorney appeared without authority, that fact can not be shown as a defense at law, in a suit upon the judgment.⁴ If an attorney appears for a part only of defendants, and inadvertently answers for all, and obtains leave of court to withdraw his answer, and substitute a new one answering for the party only for whom he appears, the court acquires jurisdiction only of those for whom he appears.⁵

§ 3952. **Attorney's Authority to Appear.**—Attorneys are officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in the proceedings only by the license of the court.⁶ And his license is *prima facie* evidence of his authority to appear for the person whom he professes to represent; but if the supposed client denies his authority, the court may require him to produce the evidence of his retainer, either upon the direct application of the person represented, or upon motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made.⁷ The practice of permitting appearance without producing a warrant of attorney is as applicable to appearance for a corporation as for a natural person.⁸ An attorney of the court who institutes suit in the name of plaintiff is presumed *prima facie* to have authority, and the adverse party or his attorney can not, upon mere suggestion at the bar, deny the right of a party to appear by the attorney of record, nor deny that the attorney so appearing has full authority to prosecute the suit.⁹ The authority of an attorney at law to appear for parties for whom he enters an appearance in an action will be presumed where nothing to the contrary appears.¹⁰ It seems that the appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give

¹ *Snydam v. Pitcher*, 4 Cal. 280.

² *Webb v. Mott*, 6 How. Pr. 440; *Dole v. Manley*, 11 Id. 138; *Hyde v. Patterson*, 1 Abb. Pr. 248; *Bierce v. Smith*, 2 Id. 411.

³ *Knox v. Summers*, 3 Cranch, 496; *Gracie v. Palmer*, 8 Wheat. 699.

⁴ *Carpentier v. City of Oakland*, 30 Cal. 439.

⁵ *Forbes v. Hyde*, 31 Cal. 342.

⁶ *Clark v. Willett*, 35 Cal. 534.

⁷ *Id.*

⁸ *Osborn v. Bank of United States*, 9 Wheat. 738.

⁹ *Turner v. Caruthers*, 17 Cal. 431.

¹⁰ *Hayes v. Shattuck*, 21 Cal. 51; *Willson v. Cleaveland*, 30 Cal. 192; *Holmes v. Rogers*, 13 Id. 191.

the party a right to assail the judgment on that ground.¹ And if an attorney has been admitted to practice in another state, and has been accustomed to practice here, and has been recognized by the courts and bar here as a member of the bar, he is *de facto* an officer of the courts of this state; and an entry of appearance by such attorney is of the same effect as though he had been admitted to practice in this state.²

§ 3953. **Counties, Suit by and against.**—Boards of supervisors have power to employ other counsel than the district attorney to assist in or to conduct the prosecution or defense of any suit to which the county is a party, which power extends equally to suits to which it is a party upon the record, and to those in the prosecution or defense of which it has or is supposed to have some interest. The judgment and discretion of the board in the exercise of this power are not open to review by the courts.³

§ 3954. **Husband and Wife.**—To constitute an appearance, there must be some act done or word spoken in court by the party charged with appearing. A recital in the record that “now come the parties by counsel, and the plaintiff withdraws” a paragraph of his complaint, and that one of the defendants (being the husband) filed his answer, held not to show an appearance by the wife.⁴

§ 3955. **Infants.**—Where in a suit against infants there was no personal service upon them, but their general guardian appeared and defended for them, it was held that such appearance gave the court jurisdiction of their persons.⁵

§ 3956. **Motion, Appearance for.**—A party who appears and contests a motion in the court below can not object, on appeal, that he had no notice.⁶ And if counsel appears to a motion, the presumption is that he appeared to oppose, not to consent to the order sought.⁷ An appearance to defend a motion is a waiver of notice.⁸ A defendant has a right to appear for the special purpose of moving to dismiss a defective summons; and if the court denies the motion, a general appearance and answer afterwards do not waive the right or cure the error, if any.⁹ Such motion may be made without entering an appearance in the action.¹⁰ And a notice that defendant appears for the sole purpose of such a

¹ Hayes v. Shattuck, 21 Cal. 51; Willson v. Cleaveland, 30 Cal. 192; Holmes v. Rogers, 13 Id. 191.

² Garrison v. McGowan, 48 Cal. 502.

³ Hornblower v. Duden, 35 Cal. 664.

⁴ Rhoades v. Delaney, 50 Ind. 468.

⁵ Smith v. McDonald, 42 Cal. 484.

⁶ Reynolds v. Harris, 14 Cal. 669.

⁷ Borkheim v. N. B. & M. Ins. Co., 38 Cal. 623.

⁸ Brown v. State, 8 Heisk. 871.

⁹ Lyman v. Milton, 44 Cal. 630.

¹⁰ Eldridge v. Kay, 45 Cal. 49.

motion is sufficient to entitle him to be heard thereon.¹ If such motion is denied, defendant may answer without waiving the benefit of an exception to the order denying his motion.² Where a petition is filed, and defendant moved to strike from the files all the papers in the action on the ground of irregularities and defects, it was held that this was an entry of appearance.³ So, also, a motion to set aside a judgment, partly on the ground of want of jurisdiction of the defendant and partly on the ground of mere irregularities consistent with the fact of jurisdiction, was held a general appearance, and waiver of any defect in service of process.⁴

§ 3957. **Partners.**—To a libel against three partners, one appeared and put in a plea in behalf of himself and his copartners, to which the plaintiff replied as to a plea of the firm, and the rejoinder was signed by the “proctor for the defendants:” it was held a sufficient legal appearance of all the defendants to sustain the judgment against them.⁵

§ 3958. **Signature of Attorney.**—If the answer has the signature of the attorney of record and that of an associate attorney attached to it, the court will not strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority.⁶ It is well settled that courts will take judicial cognizance of the signatures of their officers as such; but there is no rule which extends such notice to the signature of the parties to a cause.⁷

§ 3959. **Rights of Party Appearing.**—After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.⁸ A stipulation, signed by plaintiffs and some of the defendants to an action, for a settlement and dismissal of the action, is not such an appearance as entitles the defendants to notice of further proceedings in the action.⁹

§ 3960. **State, Appearance by.**—In an action against a state, a demurrer signed by the attorney general, as such, he being a practitioner in the court, was held an appearance for the state.¹⁰ If the state shall neglect or refuse to appear upon

¹ Lander v. Flemming, 47 Cal. 615.

² Kent v. West, 50 Cal. 185.

³ Maholm v. Marshall, 29 Ohio St. 611.

⁴ Blackburn v. Sweet, 38 Wis. 578.

⁵ Hills v. Ross, 3 Dall. 331.

⁶ Willson v. Cleaveland, 30 Cal. 192.

⁷ Alderson v. Bell, 9 Cal. 315.

⁸ Cal. Code C. P., sec. 1014.

⁹ Grant v. Schmidt, 22 Minn. 1.

¹⁰ New Jersey v. New York, 6 Pet. 323.

due service of process, no coercive measures will be taken to compel appearance, but the plaintiff will be allowed to proceed *ex parte*.¹

§ 3961. **Stipulation of an Attorney.**—An attorney at law for one of the parties, in a proceeding in a county court to determine conflicting claims to town lots, can not, after the board of trustees of the town have awarded the lots to his client, pass the client's right or title by a stipulation in the case for the entry of a void judgment.² If plaintiff's attorney stipulates that a party may file an answer *nunc pro tunc* as of a certain date, he is estopped from saying that such defendant was not a party to the action on that date.³

§ 3962. **Withdrawal of Appearance.**—A withdrawal “without prejudice to the plaintiff” of a general appearance entered by an attorney for the defendant means that the rights of plaintiff are not to be unfavorably affected by such withdrawal; and where defects in service had been healed by such appearance, advantage could not again be taken of them on account of the withdrawal.⁴ Nor can a party served by publication, who answers, be allowed to avoid the effect of such appearance, and have the case proceed as though he had been so served and had not answered, by withdrawing his answer and paying fees.⁵

CHAPTER IV.

NOTICE OF LIS PENDENS.

§ 3963. **Notice of Suit in Foreclosure.**

Form No. 958.

State of California,	} In the Superior Court.
City and County of	
A. B., Plaintiff,	}
<i>against</i>	
C. D., Defendant.	

Notice is hereby given that a suit has been commenced in said court, by the above-named plaintiff against the above-named defendant, which suit is now pending; that the object of said suit is to forelose and determine the lien of a certain mortgage, of date, executed by said defendant to said plaintiff, and recorded in the recorder's office of said county of,

¹ Massachusetts v. Rhode Island, 12 Pet. 755; New Jersey v. New York, 5 Id. 284. As to power of attorney to bind client, see Cal. Code C. P., sec. 283.

² Ryan v. Tomlinson, 31 Cal. 11.

⁴ Creighton v. Kerr, 20 Wall. 8.

³ Lawrence v. Ballou, 50 Cal. 258.

⁵ Williams v. Huling, 43 Tex. 113.

in liber of mortgages, at page; and to foreclose the defendant's equity of redemption in and to the premises described in said mortgage. Said premises are described as follows, viz. [insert description].

E. F.,

[DATE.]

Attorney for Plaintiff.

§ 3964. **Actual Notice.**—Where, after the commencement of an action of ejectment against a tenant, he gave notice to his landlord, and requested him to defend, and the latter employed an attorney to conduct the suit, it was held that the actual notice given to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him.¹ So, also, actual notice of the pendency of a suit in foreclosure is the same in effect, to the party receiving it, as if notice of *lis pendens* had been filed.²

§ 3965. **Commencement of Suit as Notice.**—The commencement of a suit in chancery is only constructive notice of the pendency of such suit, as against persons who acquired an interest under a defendant *pendente lite*.³ The mere pendency of a suit, where the bill does not lay claim to any specific land, nor to all the land of defendant in a particular county or place, but asks merely for a discovery of any land in which he has invested money, is not a constructive notice of an equity in any particular piece of land held by defendant.⁴ The commencement of an equitable action by service of summons and injunction creates a *lis pendens* and a lien in the nature of an attachment, but the plaintiff is bound to prosecute diligently to retain the lien.⁵ Mere issuing of the subpoena is not sufficient to create a *lis pendens* as against a purchaser without actual notice. Service is necessary, though it need not be personal.⁶ But filing a bill, and attempting to serve the subpoena, are sufficient against the defendant and a purchaser with notice.⁷ Until the process is served by publication made, the doctrine of *lis pendens* does not apply.⁸ But this can not be the rule, except in those states where the action is commenced by service of summons. In California the complaint precedes the summons, and the one must be filed and the other issued before the action is deemed commenced. In a suit to foreclose a mortgage held by a copartnership, whenever any member of the copartnership

¹ Sampson v. Ohleyer, 22 Cal. 200.

² Sharp v. Lumley, 34 Id. 611.

³ Stuyvesant v. Hall, 2 Barb. Ch. 151.

⁴ Griffith v. Griffith, 9 Paige Ch. 315.

⁵ Myrick v. Selden, 36 Barb. 15.

⁶ Hayden v. Bucklin, 9 Paige Ch.

⁷ Weed v. Smull, 3 Sandf. Ch. 273; Hayden v. Bucklin, 9 Paige Ch. 512.

⁸ Games v. Dunn, 14 Pet. 322; affirming S. C., 1 McLean, 321; to nearly same effect, Fowler v. Byrd, Hempst. 213.

is served with a summons, a *lis pendens* is at once created to such an extent that no person can purchase from any member of the firm any portion of the subject-matter of the action so as to affect the rights of the plaintiff.¹

§ 3966. **Actions to Which It Applies.**—The object of the notice is to give the opportunity of defense and also to notify third persons of the litigation.² It does not apply to proceedings before a board of supervisors for condemnation of land for road purposes.³ It applies to all actions affecting the title to real property.⁴ The right to file notice of *lis pendens* in such actions is an absolute one.⁵

§ 3967. **Constructive Notice.**—A *lis pendens* is constructive notice to a purchaser, and he and his interest will be bound by the decree entered in the suit.⁶ The only way to charge a purchaser of property pending a suit with constructive notice of the suit is by filing a notice of *lis pendens* according to the statute.⁷ From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser, or incumbrance of the property affected thereby.⁸ This notice applies to parties to the action and purchasers under them subsequent⁹ to filing the notice.⁹ And is as effectual as an injunction.¹⁰

§ 3968. **Creditor's Suit.**—Where notice of the pendency of a suit against a conveyance in fraud of creditors has been filed, a conveyance of the property made since the filing of the bill can not affect the complainant's rights.¹¹ A creditor's bill, to be a *lis pendens*, must be so definite in the description of the estate as that any one reading it can learn thereby what property is the subject of litigation.¹²

§ 3969. **County Bonds.**—A bill was filed enjoining a county from issuing bonds, and injunction was granted subsequently. A statute was passed authorizing the issue, and the issue was made. A year after the statute, another bill was brought to declare the bonds invalid, but they were decreed good. Two years after this decree, a bill of review was brought, and the

¹ Dresser v. Wood, 15 Kan. 360. As to service by publication, see Bayer v. Cockerill, 3 Id. 282. See also Knowles v. Rablin, 20 Iowa, 101.

² Richardson v. White, 18 Cal. 102; Sampson v. Ohleyer, 22 Id. 200; Horn v. Jones, 28 Id. 194; Sharp v. Lumley, 34 Id. 612.

³ Curran v. Shattuck, 24 Cal. 427.

⁴ Cal. Code C. P., sec. 409.

⁵ Mills v. Bliss, 55 N. Y. 139.

⁶ Harrington v. Slade, 22 Barb. 161; Sears v. Hyer, 1 Paige Ch. 483.

⁷ Ault v. Gassaway, 18 Cal. 205.

⁸ Cal. Code C. P., sec. 409.

⁹ People v. Connolly, 8 Abb. Pr. 128; Chapman v. West, 17 N. Y. 125.

¹⁰ Stevenson v. Fayerweather, 21 How. Pr. 449.

¹¹ Beeckman v. Montgomery, 1 McCarter, N. J. 106.

¹² Miller v. Sherry, 2 Wall. 237.

former decree reversed: it was held that the bonds were not issued *pendente lite*.¹

§ 3970. **Dismissal.**—Where a suit is dismissed and afterwards reinstated, the doctrine of *lis pendens* is not applicable to one who purchases after the dismissal and before the revival of the suit.²

§ 3971. **Effect of Lis Pendens.**—Its effect is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment which may be rendered in the suit in which notice is given.³ And it abrogates the rule making the mere pendency of an action constructive notice.⁴ The California statute does not give any new rights to the plaintiff, but limits rights which he had before. It simply adds to the common-law rule a single term, to wit, to require for constructive notice, not only a suit, but filing notice of it; and there is no distinction under the statute between different kinds of interest in or title to real estate.⁵ Notice by *lis pendens* does not extend so as to affect those who claim under parties who were not parties to the litigation.⁶ A *lis pendens* does not operate as notice, unless the court has jurisdiction of the thing.⁷ The only office of the *lis pendens* is to give constructive notice to, and bind by the subsequent proceedings, those who deal with the defendant in regard to the property involved in the action during its pendency and before judgment. No notice is necessary to bind a purchaser or incumbrancer after judgment.⁸

§ 3972. **Effect of Neglect to File.**—If notice of *lis pendens* be not filed, plaintiff can not successfully set up that notice would have done no good to the purchaser, because he could make no defense, or no better defense than the vendor.⁹

§ 3973. **Lien of Decree.**—Where a party having notice of the pendency of a suit to reach the equitable interests of a judgment debtor in his lands, purchases such lands, and enters upon and improves the same, he can not come into equity for relief, to have his improvements discharged from the lien of the decree

¹ Lee County v. Rogers, 7 Wall. 181.

² Herrington v. McCollum, 73 Ill. 476.

³ Gregory v. Haynes, 13 Cal. 594; Haynes v. Calderwood, 23 Id. 409; Hurlbutt v. Butenop, 27 Cal. 50.

⁴ Sampson v. Ohleyer, 22 Cal. 200.

⁵ Richardson v. White, 18 Cal. 102; Sampson v. Ohleyer, 22 Id. 200; Horn v. Jones, 28 Id. 194; Hall v. Nelson, 14 How. Pr. 32.

⁶ Scarlett v. Gorham, 28 Ill. 319.

⁷ Carrington v. Brents, 1 McLean, 167. As to whether a notice of *lis pendens* filed by plaintiff imparts notice to a purchaser from him pending the suit, so that a judgment adverse to the plaintiff would bind such purchaser, see Corwin v. Bensley, 43 Cal. 259, 263.

⁸ Sheridan v. Andrews, 49 N. Y. 478; Abadie v. Lobero, 36 Cal. 390.

⁹ Richardson v. White, 18 Cal. 102; Sampson v. Ohleyer, 22 Id. 200; Horn v. Jones, 28 Id. 194.

rendered against the land.¹ It can not be said that a case is no longer *lis pendens*, after a decree and sale, and a conveyance executed because a court of chancery is not *functus officio* until the decree is executed by delivery of possession.²

§ 3974. **Must be Filed.**—It must be filed or appear of record to charge the purchaser of the subject-matter of the suit as a purchaser *pendente lite* at common law. Mere pendency of the suit does not so charge the purchaser.³ If no notice of *lis pendens* is filed, a *bona fide* purchaser of land, without notice of proceedings pending for its condemnation at time of purchase, is not affected by the proceedings.⁴

§ 3975. **New Notice, when Necessary.**—In case of an amendment of the complaint, by adding new parties, or making a change in the description of the premises or in the amount of the claim, a new notice must be filed.⁵ This is not necessary except as to such new parties, so that when they are subsequently struck out again, no new notice is necessary.⁶ But even where parties are struck out, the safer practice is to file a new notice.⁷

§ 3976. **Notice, What to Contain.**—Notice should contain the name of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also in such notice state the nature and extent of the relief claimed in the answer.⁸ If it contain the necessary matters, including description of the property, but adds a conclusion stating that “the following real estate is intended to be affected,” and then adds a second description of the property which is erroneous, this second false description does not vitiate the notice if it would have been good without it.⁹

§ 3977. **Partition—Premises Included.**—Immediately after filing the complaint in the district court, the plaintiff must record in the office of the recorder of the county or of the several counties in which the property is situated a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing, it shall

¹ Patterson v. Brown, 32 N. Y. 81.

² Jackson v. Warren, 32 Ill. 331.

³ Head v. Fordyce, 17 Cal. 149; Ault v. Gassaway, 18 Id. 205.

⁴ Bensley v. Mountain Lake Water Company, 13 Cal. 306; Richardson v. White, 18 Id. 102.

⁵ Clark v. Havens, Clarke Ch. 560; Curtis v. Hitchcock, 10 Paige Ch. 399.

⁶ Waring v. Waring, 7 Abb. Pr. 472.

⁷ Curtis v. Hitchcock, 10 Paige Ch. 399.

⁸ Cal. Code C. P., sec. 409.

⁹ Watson v. Wilcox, 39 Wis. 643.

be deemed notice to all persons.¹ Notice of the pendency of an action should not include premises not seized by the sheriff under an attachment.²

§ 3978. **Purchaser Pendente Lite.**—A purchaser *pendente lite* is subject to all the equities of the party under whom he claims.³ One who takes an assignment as indemnity against a precedent liability is not a purchaser within the meaning of the statute requiring notice of the pendency of the suit to be filed.⁴ One who purchases land pending an action to foreclose a mortgage on it, or after final judgment, with notice of the pending action, or of the judgment, is bound by the judgment. If no action of *lis pendens* has been filed, and he purchases without notice after entry of default, but before final judgment, he is not bound by the judgment, even if a final judgment gives constructive notice to parties dealing with the subject-matter, and a second purchaser is in no worse position than his grantor.⁵ An action is pending after default and until final judgment is entered. But a purchaser with notice occupies the same position as his grantor in reference to the issuance of a writ of assistance to the purchaser under the decree.⁶

§ 3979. **Purchaser Bound by Decree.**—A person purchasing during the litigation, a notice of *lis pendens* being on file, is bound by the decree in such suit.⁷ But it does not apply to one whose interest subsisted before the suit was commenced, and who might have been an original party.⁸ A purchaser of mortgaged premises who neglects to have his deed recorded until after the filing of the *lis pendens* for the foreclosure of the mortgage is precluded from asserting title under it as against the purchaser at the foreclosure sale.⁹ The record of a chancery suit wherein a conveyance of land is decreed is not constructive notice, binding upon subsequent purchasers from the party decreed to convey, until after it has been recorded in the county where the land is situated.¹⁰

§ 3980. **Tax Suit.**—In an action to enforce the lien of a

¹ Cal. Code C. P., sec. 755.

² Fitzgerald v. Blake, 42 Barb. 513. What description of lands in a bill is sufficient to put a purchaser on inquiry, see Green v. Slayter, 4 Johns. Ch. 38; compare Parks v. Jackson, 11 Wend. 442.

³ McPherson v. Housel, 2 Beas. 299.

⁴ Leavitt v. Tylce, 1 Sandf. Ch. 207.

⁵ Abadie v. Lobero, 36 Cal. 390.

⁶ Montgomery v. Byers, 21 Cal. 107.

⁷ Hurlbutt v. Butenop, 27 Cal. 50;

Calderwood v. Tevis, 23 Id. 335; Horn v. Jones, 28 Id. 194; Zeiter v. Bowman, 6 Barb. 133; Griswold v. Miller, 15 Id. 520; Cleveland v. Bocrum, 23 Id. 201; S. C., 27 Id. 252; S. C., 3 Abb. Pr. 294.

⁸ Hopkins v. M'Laren, 4 Cow. 667; Parks v. Jackson, 11 Wend. 442.

⁹ Ostrom v. McCann, 21 How. Pr. 431.

¹⁰ Rosser v. Bingham, 17 Ind. 542.

tax by a sale or the property, it is not necessary to file a *lis pendens*.¹

§ 3981. **United States Courts.**—The statute of California relating to the filing of *lis pendens* does not apply to suitors except in the state courts. Neither that statute nor any equivalent proceeding has been incorporated into the rules of the United States supreme court, as applicable to suits in equity, nor into the rules of the United States circuit court for the ninth circuit.²

§ 3982. **When to be Filed.**—In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated a notice of the pendency of the action.³ A purchaser of real property, pending suit affecting the title to it, is not bound by the judgment unless notice of *lis pendens* be filed with the county recorder before the purchase.⁴ The court has no power to take from the files a *lis pendens* regularly filed.⁵

§ 3983. **Notice of Suit in Partition.**

Form No. 959.

[TITLE.]

Notice is hereby given that an action has been commenced in the superior court of the state of, in and for the county of, by the above-named plaintiff against the above-named defendant, which suit is now pending. That the object of said suit is to obtain partition between plaintiff and defendant of the premises mentioned in the complaint in said action, and hereinafter described, according to the rights of the parties therein; that the premises affected by the suit are situated in said city and county, and are described as follows, to wit [describe property].

E. F.,

[DATE.]

Attorney for Plaintiff.

§ 3984. **Notice of Pendency of Action of Ejectment.**

Form No. 960.

[TITLE.]

Notice is hereby given that an action has been commenced in the superior court of the state of, in for the city and county of, by the above-named plaintiff against the above-named defendant, to recover certain real estate, and the possession thereof, with damages for the withholding thereof;

¹ Reeve v. Kennedy, 43 Cal. 643.

⁴ Richardson v. White, 18 Cal. 102.

² Majors v. Cowell, 51 Cal. 478.

⁵ Pratt v. Hoag, 12 How. Pr. 215.

³ Cal. Code C. P., sec. 409.

and that the premises affected by this suit are situated in the said city and county, and are bounded and described as follows, to wit [describe property].

[DATE.]

[SIGNATURE.]

§ 3985. **Notice of Pendency of Action to Quiet Title.**

Form No. 961.

[TITLE.]

Notice is hereby given that an action has been commenced in the superior court of the state of, in and for the county of, by the above-named plaintiff against the above-named defendant, to quiet the title to the premises and real estate in the complaint in the said action, and hereinafter described, and to determine all and every claim, estate, or interest therein of said defendants, or either or any of them, adverse to the said plaintiff, and that the premises affected by this suit are situated in said county, and are bounded and described as follows, to wit [describe the premises].

A. B.,

[DATE.]

Attorney for plaintiff.

PART SEVENTH.

PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

§ 3986. **In General.**—The laws of the land and an enlightened public opinion long since decreed that there should be no more imprisonment for debt, unless there was some act connected with the contracting of the debt or avoiding its payment which tainted the transaction with fraud.¹ In this age the mere misfortune of poverty excites sympathy, instead of provoking the additional misfortune of the jail.. It will thus be seen that the subject of arrest and bail, in matters pertaining to civil actions, is very limited. It is provided by the California statute, and the same provision is found in most of the states, that no person shall be arrested in a civil action except as prescribed by this code.² The statute proceeds to designate five instances in which a defendant may be arrested in a civil action, which will be referred to hereafter; and the practitioner must remember two facts when he attempts to get an order of arrest in a civil action: 1. This statute will be strictly construed, and if there be a question of doubt about defendant's guilt, the courts will incline to innocence and favor the defendant; and, 2. In no case should a defendant be arrested in a civil action, unless it is clear that the facts charged will bring him within the letter as well as the spirit of the statute. This extraordinary remedy was only intended for extreme cases. It should be invoked only as a punishment for dishonesty, and hence it is the rule that in the affidavit prescribed by section 481, California code civil procedure, the mere statement in the language of the statute showing defendant's guilt is not enough; the facts must be clearly

¹ Const. of Cal., art. 1, sec. 15.

² Cal. Code C. P., sec. 478.

and pointedly stated, not the result of facts which are assumed to exist, but the history of the fraudulent acts must be given, and given with particularity, and no form of affidavit can be given which will fit all cases, or even more than one, except only those portions which are purely formal.

But it has been held that, to entitle a party to the remedy of arrest, it is not necessary that he should know positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended.¹ Hence arrest is maintainable by the assignee of a cause of action.² An original cause of action is merged in a foreign judgment in an action for fraud, and defendant is not arrestable in an action on such judgment.³ But a vacated judgment is no bar to arrest for the same cause, though ordered to stand as security.⁴ Fraud in incurring original indebtedness is not merged in taking the debtor's note or check, but he may be arrested after its dishonor.⁵ But bringing an action on the check of two joint debtors invalidates an arrest of one for a separate fraud.⁶ The provisions of section 72 of the California practice act⁷ have reference to mesne and not to final process.⁸ In cases of fraud, it appears that there can be but two judgments—one against the person and the other against the property; in the former of which the execution issues directing the officers to arrest and confine the party until the debt is paid.⁹ To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment.¹⁰ When the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the court either to amend the original or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought.¹¹

§ 3987. Privilege from Arrest, Who Entitled to.— Under the constitution and laws of California, certain persons

¹ Southworth v. Resing, 3 Cal. 378.

² Grocers' Nat. Bank v. Clark, 32 How. Pr. 160.

³ Mallory v. Leach, 23 How. Pr. 507; S. C., 14 Abb. Pr. 449, n.

⁴ Mott v. Union Bank, 8 Bosw. 591. As to how far original remedy for fraud may be waived by a subsequent negligence or compromise, see Adams v. Sage, 28 N. Y. 103.

⁵ Shipman v. Shafer, 14 Abb. Pr. 449; see also Murphy v. Fernandez, 10 Bosw. 664.

⁶ Woodruff v. Valentine, 19 Abb. Pr. 93.

⁷ Cal. Code C. P., sec. 478.

⁸ Stewart v. Levy, 36 Cal. 159.

⁹ Matoon v. Eder, 6 Cal. 60.

¹⁰ Davis v. Robinson, 10 Cal. 411.

¹¹ Id.

are privileged from arrest except for certain specified offenses.

1. Members of the legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest, and shall not be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.¹ 2. Electors shall in all cases except treason, felony, or breach of the peace be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom.² By section 1069, political code of California, electors are privileged from arrest, except for an indictable offense, during their attendance on an election, and in going to and returning therefrom. 3. No person under military orders for parade, drill, or other military service is subject to arrest on civil process while going to, returning from, or on such parade.³ 4. No female can be arrested in any action.⁴ 5. Witnesses who have been in good faith served with a subpoena to attend before a court, judge, commissioner, referee, or other person, in a case where disobedience may be punished as a contempt, are exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom.⁵ At common law the privilege extends also to jurors, parties, officers, and judges, and protects them while in attendance upon their public duties from arrest, summons, or any other civil process.⁶ Though the common-law privilege of the officers of courts of justice can not be taken away by the general words, yet they may be by the manifest intent of the statute.⁷

The privilege of a suitor or witness extends to exemption from arrest, and no further.⁸ So with an applicant for the benefit of the bankrupt law.⁹ The privilege of a witness protects him while at his lodgings as well as in the street, going to or from the court;¹⁰ but it does not extend after he is discharged from the obligation of the subpoena.¹¹ The mode of redress for

¹ Const. Cal., art. 1, sec. 15.

² Id., art. 2, sec. 2.

³ Cal. Pol. Code, sec. 2021.

⁴ Cal. Code C. P., sec. 861.

⁵ Id., sec. 2067. The penalty for making an arrest of a witness is prescribed by section 2068.

⁶ Cassidy v. Steuart, 40 Eng. Com. L. 464; Hurst's Case, 4 Dall. 388; Geyer v. Irwin, Id. 107; Bolton v. Martin, 1 Id. 296; Miles v. McCullough, 1 Binn. 77; Behncke v. King, 9 Serg. & R. 150; 1 Miles, 237; Cole v. Andrews, Andrews, 275; Ex parte

M'Neil, 6 Mass. 245, 264; Tracy v. Whipple, 8 Johns. 330; Lyell v. Goodwin, 4 McLean, 29; Page v. Randall, 6 Cal. 32.

⁷ Case of Bliss, 9 Johns. 347.

⁸ Blight v. Fisher, Pet. C. C. 41; McFerran v. Wherry, 5 Cranch C. C. 677.

⁹ Anonymous, 6 Hunt's Merch. Mag. 355.

¹⁰ Ex parte Hurst, 1 Wash. C. C. 186.

¹¹ Smythe v. Banks, 4 Dall. 329. As to extent of an elector's privilege—also as to waiver of privilege gen-

a person privileged from arrest, when arrested, is by a motion to the court from which the process was issued to set aside the service and discharge the party; or in other words, to abate the writ.¹ It is erroneous to vacate an order of arrest on the ground that the defendant is exempt from arrest by virtue of his office. The plaintiff is entitled to retain his order, for the purpose of making the arrest when the exemption expires.²

§ 3988. **Grounds for Arrest.**—The defendant may be arrested in the following cases: 1. In an action for the recovery of money, or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors; 2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty; 3. In an action to recover possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of to prevent its being found or taken by the sheriff; 4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought; 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.³ There are also special cases in which the statute authorizes an order of arrest to be made in civil proceedings; as in forcible entry or detainer cases, where the complaint establishes to the satisfaction of the judge, fraud, force, or violence in the entry or detainer, and that the possession held is unlawful;⁴ or for refusing to produce a will;⁵ and in other proceedings in the probate court; in actions for usurpation of office;⁶ in proceed-

erally, by giving bail or appearance: *Petrie v. Fitzgerald*, 1 Daly, 401. As to extent of privilege of a policeman—being confined to the period when on actual duty: *Hart v. Kennedy*, 39 Barb. 186; S. C., 24 How. Pr. 425; S. C., 15 Abb. Pr. 290; reversing S. C., 23 How. Pr. 417.

¹ *Lyell v. Goodwin*, 4 McLean, 29.

² *Hart v. Kennedy*, 15 Abb. Pr. 290; S. C., 24 How. 425.

³ Cal. Code C. P., sec. 479.

⁴ *Id.*, sec. 1168.

⁵ *Id.*, sec. 1302.

⁶ *Id.*, sec. 804.

ings supplementary to execution;¹ and in many other cases technically denominated contempts.²

§ 3989. **Affidavit for Arrest.**—It must appear to the judge by the affidavit that a sufficient cause of action exists, and that the case is one of those mentioned in the statute.³ The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded.⁴ Under a former statute substantially like the present, it was said to be well settled that the facts necessary to be shown must appear in the affidavit itself, and that it was not sufficient to refer to the complaint or to any other paper to show what ought to be disclosed by the affidavit, although it is positively averred that such paper or complaint is true.⁵ A sworn complaint is available as an affidavit with others to sustain an order of arrest.⁶ Fraud, as a ground of arrest, must be clearly proved. If there is a serious doubt as to the fraud, an order of arrest is not allowable.⁷ The plaintiff's affidavit must specify and establish the particular fraud relied upon as the foundation of the order. He can not, upon a motion to vacate the order, set up a ground for retaining it which was not put forth as the original ground of the order.⁸ Documents relied on must be presented, or copies furnished.⁹ Where some of the material allegations of the affidavit are upon information and belief, the sources and nature of the information must be particularly set out, and a good reason given why a positive statement can not be procured.¹⁰ The rule that one shall not resort to inferior evidence when he has it in his power to produce evidence affording greater certainty of the fact in question, applies to an affidavit to obtain an order of arrest.¹¹ An affidavit grounded entirely on information and belief as to all the facts constituting the fraud is insufficient.¹² The

¹ Cal. Code C. P., sec. 715.

² For the cases in which an order of arrest may be issued by a justice of the peace, see Cal. Code C. P., sec. 861.

³ Cal. Code C. P., sec. 481.

⁴ Id.

⁵ *McGilvery v. Moorhead*, 2 Cal. 609. But see *Brady v. Bissell*, 1 Abb. Pr. 76; *Turner v. Thompson*, 2 Id. 444, where it is held that if the complaint is before the judge when the order is granted, it may be looked to to aid a defective affidavit, and that the order should then recite that it appeared by affidavit and the complaint duly

sworn to that a cause of action existed, etc.

⁶ *Palmer v. Hussey*, 59 N. Y. 647; affirming 65 Barb. 278.

⁷ *Claffin v. Frank*, 8 Abb. Pr. 412.

⁸ *Cady v. Edmonds*, 12 How. Pr. 197.

⁹ *De Weerth v. Feldner*, 16 Abb. Pr. 295; *De Nierth v. Snider*, 25 How. Pr. 419.

¹⁰ *De Weerth v. Feldner*, *supra*.

¹¹ Id. As to the distinction between "stating the sources of information" and "setting them forth," see Id.

¹² *Satow v. Reisenberger*, 25 How. Pr. 164.

amount claimed by the plaintiff should be stated positively. "About four thousand nine hundred and thirty dollars" has been held insufficient.¹

§ 3990. Affidavit—By Third Persons.

Form No. 962.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I am an agent of the above-named plaintiff A. B., at.....
[state the nature of the agency, and continue as in succeeding forms].²

§ 3991. Affidavit for Order of Arrest—Departing out of the State with Intent to Defraud Creditors.

Form No. 963.

[TITLE.]

State of California,
.....county of } ss.

....., being duly sworn, says that is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff against said defendant as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money on a cause of action arising upon an contract, and that the defendant in said action is about to depart from this State with intent to defraud his creditors.

And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to wit [state facts].

[JURAT.]

[SIGNATURE.]

§ 3992. What Affidavit must State.—In an action for the recovery of money or damages, on a cause of action arising upon contracts express or implied, when the defendant is about to depart from the state with intent to defraud his creditors,³ the affidavit must state the facts and circumstances which justify the conclusion that the defendant has removed or disposed of his property, so that the court may be able to draw it from the evidence detailed in the affidavit.⁴

¹ Tipton's Lessee v. Ross, 10 Ohio, 263.

² It is not absolutely necessary that deponent should show any connection between him and the plaintiff: Cal. Code C. P., sec. 481; but where there is a connection, it is better to state it.

³ California Code of Civil Procedure,

sec. 479, subd. 1; N. Y. Code, sec. 550, subd. 2.

⁴ See Smith v. Luce, 14 Wend. 237, and cases there cited in note a; Ex parte Robinson, 21 Id. 672; Frost v. Willard, 9 Barb. 440; Castellanos v. Jones, 5 N. Y. 164; compare Donnelly v. Corbett, 7 Id. 500; Van Alstyne v. Erwin, 11 Id. 331.

§ 3993. **Fraudulent Intent.**—Evidence of a fraudulent intent must depend upon the particular circumstances of each case. The declarations of the debtor are often sufficient, at least if coupled with acts of a suspicious character.¹ The mere fact that defendant is about to depart, although he owes debts to a large amount, is not enough. It must appear that he has removed or disposed of his property, or is about to do so, secretly. It is the secrecy which evinces the fraudulent intent.² This, however, must be taken with qualification.³ Assault and battery is not a case of fraud, and persons can not be arrested in civil actions for the same.⁴ But it is not proper to grant a writ of arrest for a personal tort, as of course, unless the defendant is a non-resident, or transient, or the tort is aggravated.⁵ This rule does not apply to California.

§ 3994. **Affidavit Showing that Money has been Received by Defendant in a Fiduciary Capacity.**

Form No. 964.

[TITLE.]

[VENUE.]

....., being duly sworn, says that he is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff, against said defendant, for the sum of dollars, as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money received by the defendant as a broker, in the course of his employment as such, and by him fraudulently converted to his own use; and affiant further states and shows the following facts and circumstances in support of the above allegation of fraud and conversion, to wit: that on the day of, 18.., at, he delivered to the defendant C. D., of, who was then and there a broker, a promissory note made by E. F. to the order of the plaintiff, dated the day of, 18.., and payable months after date, for the sum of dollars, and indorsed by plaintiff, for sale on plaintiff's account, but for no other purpose whatever; that he gave no authority to the said C. D. to retain the proceeds of said note, or any part thereof, for any time whatever; that on

¹ Compare *Courter v. McNamara*, 9 How. Pr. 255; and *Hathorn v. Hall*, 4 Abb. Pr. 227.

² Anonymous, 2 Code R. 51.

³ Compare *Courter v. McNamara*, 9 How. Pr. 255. As to what is sufficient evidence of a fraudulent intent, see also *McButt v. Hirsch*, 4 Abb. Pr.

441; and *Spies v. Joel*, 1 Duer, 669; and see *Cary v. Williams*, Id. 667.

⁴ *Ex parte Prader*, 6 Cal. 239. As to arrestability of parties in actions for willful damage, see *Niver v. Niver*, 43 Barb. 411; S. C., 29 How. Pr. 6; S. C., 19 Abb. Pr. 14.

⁵ *Davis v. Scott*, 15 Abb. Pr. 127.

the day of, 18.., the said defendant C. D. sold the said note and received therefor the sum of dollars, in lawful money of the United States, of which sum this affiant was then and there entitled to receive the sum of dollars; that he has demanded the said sum last named from said C. D., but he has not paid or accounted for the same, or any part thereof [and wholly refuses so to do].

[JURAT.]

[SIGNATURE.]

§ 3995. **Agent.**—An agent who is intrusted with negotiable paper to be discounted, and who transfers it to a *bona fide* purchaser and receives the proceeds, applying them to his own use, is liable for the money in a fiduciary capacity.¹ In a suit to recover money received by a person as agent, he can not be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal and a refusal by him to pay. An arrest without such showing is prohibited by section 15, article 1, of the constitution.²

§ 3996. **Conversion of Property.**—The defendant may be arrested in an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff.³ Where the right to an arrest flows directly from the matter of the cause of action itself, *e. g.*, in an action for the wrongful conversion of personal property, the court will not try the merits upon affidavits, and will not discharge the order unless the defendant makes out a clear case of innocence.⁴ There must be a fraudulent concealment to maintain arrest under subdivision 3 of the New York statute.⁵

§ 3997. **Fiduciary Character.**—The complaint should state the facts that constitute the fiduciary character, as well as its nature and extent.⁶ It is necessary in such a case to charge, not only that defendant received the money as agent, but that he converted it in the course of his employment as such.⁷ Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, the character or capacity must be averred in direct and positive terms, or the charge must fall.⁸

¹ Wolfe v. Bronwer, 5 Rob. 601.² In the Matter of Holdforth, 1 Cal. 438.³ Cal. Code C. P., sec. 479, subd. 3.⁴ Royal Ins. Co. v. Noble, 5 Abb. Pr., N. S., 54.⁵ Jananique v. De Luc, 1 Abb. Pr.,

N. S., 419; Elston v. Potter, 9 Bosw.

636. As to the proper form of security and order under this subdivision, see Elston v. Potter, Id.

⁶ Porter v. Hermann, 8 Cal. 623.⁷ Id.⁸ Id.

§ 3998. **Grounds of Arrest.**—The defendant may be arrested in an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty.¹ The character or capacity in which a party is alleged to have received money or property is essential to the charge of fraud, and that character or capacity must be positively and directly averred, or the affidavit will be insufficient.²

§ 3999. **Partners.**—A., being owner of an invoice of goods in the city of New York, sold one half interest therein to B., with an arrangement that the latter should proceed to San Francisco, and there dispose of the same on joint account: it was held that this constituted a partnership between them, and that B. was not subject to arrest in an action by A. to recover a part of the proceeds of the sales.³ Section 74 of the practice act,⁴ which provides for the arrest of a debtor in certain cases, does not apply in the case of one partner suing to recover money received by another.⁵ The words “fiduciary capacity” do not characterize the relation which one partner holds to the other.⁶

§ 4000. **Who may be Arrested.**—A broker who misapplies funds deposited is arrestable, and the taking of collaterals does not change the character of his liability.⁷ A guardian who uses the funds of a ward is arrestable.⁸ So, also, a party receiving the avails of goods as indemnity against his guaranty of payment,⁹ or as consignee guaranteeing payment.¹⁰ But a mere consignee doing business in the ordinary way as a commission merchant is not arrestable.¹¹ Claim to money by third person is no bar to arrest of fiduciary receiving it.¹² A part payment for goods by a bailee, who is to return on payment for them, does not bar an arrest in a subsequent action for their conversion.¹³

¹ Cal. Code C. P., sec. 479, subd. 2; N. Y. Code, sec. 550.

² Porter v. Hermann, 8 Cal. 624.

³ Soule v. Hayward, 1 Cal. 345.

⁴ Cal. Code C. P., sec. 479.

⁵ Id.

⁶ Id.

⁷ Dubois v. Thompson, 1 Daly, 309; S. C., 25 How. Pr. 417.

⁸ Wheelock v. Stewart, 28 How. Pr. 89.

⁹ Chaine v. Coffin, 17 Abb. Pr. 441.

¹⁰ Ostell v. Brough, 24 How. Pr. 274.

¹¹ Duguid v. Edwards, 32 How. Pr. 254.

¹² Gross v. Graves, 19 Abb. Pr. 95.

¹³ Person v. Civer, 29 How. Pr. 432.

§ 4001. Affidavit for Order of Arrest — Fraudulent Debtor.

Form No. 965.

[TITLE.]

[VENUE.]

....., being duly sworn, says that is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff against said defendant, for the sum of dollars, as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money on a cause of action arising upon an [express] contract, and that the defendant in said action has been guilty of a fraud in contracting the debt and incurring the obligations for which the said action is brought.

And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to wit [state fully and particularly all the facts relied upon as constituting and proving the fraud. If any of the material averments are made upon information and belief, state the sources of information, and why the affidavit of a person having personal knowledge is not presented. If documents or papers are referred to as a source of information, and these are not in affiant's possession or under his control, attach copies thereof properly referred to, or show why copies can not be procured].

[JURAT.]

[SIGNATURE.]

§ 4002. Causes of Action Joined.—Where two separate causes of action are joined in one complaint, an arrest will not lie for fraud in respect to one, where the defendant is innocent as to the other.¹ Where the action is to recover money collected by a public officer, with interest, the claim for interest is not a separate cause of action, and the defendant may be arrested.²

§ 4003. Circumstances must be Shown.—The practitioner can not be too careful in specifying the particular circumstances establishing the fraud relied upon as the foundation of the order. He can not, upon a motion to vacate his order, set up a ground for retaining it not put forth as the original ground of the order.³

§ 4004. Complaint.—The writ of arrest is only an intermediate process to secure the presence of the defendant until final judgment; and to authorize arrest on final process the fraud must be stated in the judgment, and the facts on which it is

¹ Toffy v. Williams, 5 Thomp. & C. 294; Goodale v. Finn, 4 Id. 432.

² People v. Clark, 45 How. Pr. 12.

³ Cady v. Edmonds, 12 How. Pr. 197.

based must be affirmatively found. This can not be done unless the fraud is averred in the complaint. The affidavit will not aid the complaint.¹

§ 4005. **Evidence Essential.**—In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true.² A defendant can not be arrested for fraudulent representations in obtaining money, when the representations were made some time after the money was obtained.³ Under subdivision 4 of section 179 of the New York code (as amended in 1863, and which corresponds to subdivision 4, section 479, California code of civil of procedure) the defendant in an action to recover damages for false and fraudulent representations respecting the pecuniary responsibility of third persons is liable to arrest.⁴

§ 4006. **Fraudulent Intent.**—In all cases where fraud is charged, proof of an actual intent ought to be required to justify or sustain an arrest.⁵ A purchaser who obtains credit by false representations must be held to intend the legitimate consequences of his acts.⁶ An attempt to postpone payment for a week, and failing within two days thereafter, was held to be conclusive evidence of intent to defraud, in the absence of any explanation.⁷ An intent to defraud existing at the time the obligation was contracted, may be inferred from subsequent circumstances.⁸

§ 4007. **Fraudulent Purchase.**—Where one purchased bills of exchange on credit, for the purpose of remitting to Europe, and afterwards sold them in the market, it was held that as he purchased the bills with the intention to make such use of them, and knowing his inability to pay for them, the purchase was fraudulent, and that he was liable to arrest in an action for their value.⁹ Purchase with preconceived design not to pay is fraudulent, though a mere concealment of insolvency does not make it so.¹⁰ It is not necessary that misrepresentation should be sole inducement to sale.¹¹ Party making representation false in fact

¹ See *Mattoon v. Eder*, 6 Cal. 61.

² *Belden v. Henriques*, 8 Cal. 87.

³ *Snow v. Halstead*, 1 Cal. 361.

⁴ *Hazlett v. Gill*, 19 Abb. Pr. 353.

⁵ *Birchell v. Straus*, 28 Barb. 293; S. C., 8 Abb. Pr. 53; *Gaffney v. Burton*, 12 How. Pr. 516.

⁶ *Whitcomb v. Salsman*, 16 How. Pr. 533.

⁷ *Smith v. Frank*, 2 Rob. 626.

⁸ *Lovell v. Martin*, 11 Abb. Pr. 126; see *Philips v. Benedict*, 33 Barb. 655; S. C., 20 How. Pr. 265.

⁹ *Morrison v. Garner*, 7 Abb. Pr. 425; see also *Brown v. Montgomery*, S. C., 20 N. Y. 287.

¹⁰ *Hennequin v. Naylor*, 24 N. Y. 139; *King v. Phillips*, 8 Bosw. 603.

¹¹ *Shaw v. Stine*, 8 Bosw. 157.

is liable for it, though at the time he did not know whether it were true or false.¹

§ 4008. **Grounds of Arrest.**—When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, he may be arrested.² An honest though abortive purpose to continue business, and pay for the goods, is consistent with the vendee's knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded in delusive and unreasonable expectations.³ An arrest for fraudulent representations, inducing purchase of property in a foreign country, will be sustained when property is brought into the state, though in such foreign country defendant would not have been arrestable; the *lex fori* governs.⁴

§ 4009. **Obligation—Debt.**—Debt and obligation have the same meaning in this connection. They both import a contract liability. Debt implies a fixed and absolute liability, a sum actually owing from one party to another. Obligation includes an inchoate and conditional liability, the fixed character of which is to be determined by subsequent events.⁵

§ 4010. **Partners.**—Both partners are liable to arrest in an action on a debt of the firm fraudulently contracted by one of them.⁶ In *McNeely v. Haynes*, 76 N. C., it was held that “a defendant in a civil action can not be arrested unless he has been guilty of a fraud.” The partner who had procured the goods by fraudulent representations had escaped, and the other partner was arrested. The court says: “As it appears from the case, J. A. Haynes was not present when the goods were purchased by Calvin, had no knowledge of it, and in no wise connived at or assented to it; nor does it appear that the goods were

¹ *Craig v. Ward*, 36 Barb. 377; *Sharp v. Mayor of New York*, 40 Id. 256; S. C., 25 How. Pr. 389.

² Cal. Code C. P., sec. 479, subd. 4. For illustrations of the principles upon which orders of arrest may be granted under this subdivision, see the following cases: *Bean v. Renway*, 17 How. Pr. 90; *Freeman v. Leland*, 2 Abb. Pr. 479; *Bell v. Mali*, 11 How. Pr. 254; *Union Bank v. Mott*, 6 Abb. Pr. 315.

³ *Nichols v. Pinner*, 18 N. Y. 295; compare *Mitchell v. Worden*, 20 Barb. 253.

⁴ *City Bank v. Lumley*, 28 How. Pr. 397.

⁵ *Ely v. Steigler*, 9 Abb. Pr., N. S., 35; *Smith v. Corbiere*, 3 Bosw. 634; *Oatley v. Lewin*, 47 Barb. 18; *Crandall v. Bryan*, 15 How. Pr. 48.

⁶ *Union Bank v. Mott*, 6 Abb. Pr. 319, note; *Townsend v. Bogart*, 11 Id. 355; *Bull v. Melliss*, 9 Id. 58; *Coman v. Reese*, 21 How. Pr. 114; *Sberman v. Smith*, 42 Id. 198. But opposed to these cases is *Hanover v. Sheldon*, 9 Abb. Pr. 240, and note. This case, however, is expressly overruled by the later case of *Sherman v. Smith*, *supra*.

sent to or received by him." How much importance was attached to the fact last stated does not appear. In *Claffin v. Frank*, 8 Abb. Pr. 412, it was held that the defendant is not liable to arrest for the fraud of his agent, without personal guilt on his part in respect to the commission of the fraud, or by ratification of the fraudulent act; but in later cases it is said that so long as the principal retains the benefit of the dealing he can not claim immunity on the ground that the fraud was committed by his agent, and not by himself.¹ In *Sherman v. Smith*, the liability of the copartner is placed on the same grounds, viz., agency, and the profit resulting from the wrong. The reasoning of these cases is by no means satisfactory, if we are to understand the principle laid down as a universal one. If the partner, originally innocent, after he is informed of the fraud, refuses to restore the goods, or to pay therefor if they are sold or consumed, having the ability to do so, he might be well held to have ratified the fraudulent act of his partner; for if the retention of the goods, or of the profits of the fraudulent act of his partner, is to make him liable to arrest, it ought to appear that such retention is voluntary, and not the result of inability.

§ 4011. **Statements Sufficient.**—It is not necessary that the defendant should be benefited by his false representation, or in collusion with another. It is sufficient if the representation induces action by the plaintiff.² But to give an action for them, representations must be made to plaintiff, or with design to influence his conduct.³ If the affidavit shows a cause of action in the nature of an action on the case for obtaining goods from the plaintiffs by fraud, it is not to be inferred that the complaint will not state a cause of action of that nature, because the affidavits also allege that the action is brought to recover the price of goods sold.⁴ To sustain an order of arrest under this subdivision, it must appear: 1. That the defendant has made representations which were false; 2. That he knew them to be false;⁵

¹ See *Bennett v. Judson*, 21 N. Y. 238; *Crans v. Hunter*, 28 Id. 389, 393; *Elwell v. Chamberlain*, 31 Id. 611, 619.

² *Hubbard v. Briggs*, 31 N. Y. 518.

³ *Van Kleeck v. Le Roy*, 37 Barb. 544. See, as to evidence of contemporaneous frauds, *Amsden v. Manchester*, 40 Id. 158. See, as to what will be sufficient to make out a case of fraud, *White v. Dodds*, 42 Id. 554; S. C., 28 How. Pr. 197; S. C., 18

Abb. Pr. 250; *Potter v. Sullivan*, 16 Id. 295; *Smith v. Countryman*, 30 N. Y. 655. See, as to what is necessary to constitute an actual fraud, *Farington v. Bullard*, 40 Barb. 512, 516.

⁴ *Townsend v. Bogart*, 11 Abb. Pr. 355. For another form sufficient, see same cases.

⁵ *Gaffney v. Burton*, 12 How. Pr. 516; *Young v. Covell*, 8 Johns. 23; *Addington v. Allen*, 11 Wend. 374.

3. That the plaintiff relied upon, and was in point of fact deceived by them.¹

§ 4012. Affidavit for Order of Arrest—Removal of Property with Intent to Defraud.

Form No. 966.

[TITLE.]

[VENUE.]

....., being duly sworn, says that is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff against said defendant for the sum of dollars, as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money on a cause of action arising upon an contract, and that the defendant in said action remove and dispose of his property with intent to defraud creditors.

And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to wit [state them fully].

[JURAT.]

[SIGNATURE.]²

§ 4013. Undertaking on Order of Arrest.

Form No. 967.

[TITLE.]

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the superior court of the state of, in and for the city and county of, against the above-named defendant, and is about to apply for an order for the arrest of the said defendant in said action.

Now, therefore, we, the undersigned, residents of the county of, in consideration of the premises, and of the issuing of said order of arrest, do undertake in the sum of dollars, and promise to the effect that if the said defendant recover judgment, the said plaintiff will pay all costs and charges that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum of dollars.

O. P. [Seal.]

Q. R. [Seal.]

[DATE.]

¹ See *Freeman v. Leland*, 2 Abb. Pr. 479; *Wanzer v. De Baun*, 1 E. D. Smith, 261.

² Defendant may be arrested when he has removed or disposed of his property, or is about to do so, with intent to defraud his creditors: Cal.

Code C. P., sec. 479, subd. 5; N. Y. Code, sec. 550, subd. 2. Proof of actual fraudulent intent is requisite to justify an arrest under this subdivision: *Pacific Mut. Ins. Co. v. Machado*, 16 Abb. Pr. 451. See *ante*, sec. 4006.

AFFIDAVIT OF QUALIFICATION.

State of California, }
 county of } ss.

.....,, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: That he is a resident and holder within this state, and is worth the sum specified in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

[JURAT.]

[SIGNATURES.]

§ 4014. **Approval of Undertaking.**—Court commissioners have power to approve undertakings.¹

§ 4015. **Dismissal of Action.**—If the action is dismissed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.²

§ 4016. **Justification of Sureties.**—Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or freeholder, within the state, and worth the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the clerk of the court.³ The obligations of bail are assumed with reference to the law, which becomes a part of their contract, and the whole statute must be examined to determine their liability.⁴

§ 4017. **Qualification.**—Under an order upon the plaintiff to file security for costs, and an undertaking executed by two sureties is filed, the qualification of one of the sureties upon exceptions is sufficient.⁵

§ 4018. **State, etc., Exempt.**—In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city, or town; but on complying with other provisions of the code of civil procedure, such parties shall have the same rights, remedies, etc., as if such bond, etc., were given and approved.⁶

¹ Cal. Code C. P., sec. 259, subd. 3.² Cal. Code C. P., sec. 581.³ Cal. Code C. P., secs. 482 and 1057; N. Y. Code, sec. 812.⁴ *Matoon v. Eder*, 6 Cal. 57; see Cal. Code C. P., secs. 494, 495, 496.⁵ *Riggins v. Williams*, 2 Duer, 673.⁶ Cal. Code C. P., sec. 1058.

§ 4019. **Sufficient Surety—Under Seal.**—Although the word “sureties” is used in the statute, yet an undertaking with one surety may be accepted as sufficient.¹ The undertaking may properly be under seal, but this is not essential nor usual.²

§ 4020. **Undertaking Essential.**—Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking.³

§ 4021. **Who must Join.**—The preponderance of authority seems to be that the undertaking need not necessarily be executed by the plaintiff personally.⁴ So, in an action brought on behalf of a foreign government, an undertaking to procure an arrest of defendant, executed by an agent appointed to sue, is good as an undertaking on the part of the plaintiff.⁵

§ 4022. **Indorsement of Judge's Approval.**

Form No. 968.

I approve the within undertaking, and the sufficiency of the sureties therein named.

[DATE.]

[SIGNATURE.]

§ 4023. **Order of Arrest.**

Form No. 969.

[TITLE.]

The people of the state of California,
To the sheriff of the city and county of

The above-named plaintiff having commenced an action in the superior court of the state of, in and for the county of, against the above-named defendant, and it duly appearing to me, from affidavits submitted on the part of the said plaintiff, that a sufficient cause of action exists, that the case is one of those mentioned in section 479 of the code of civil procedure of this state, to wit:

That the said defendant has been guilty of fraud in contracting the debt for which the said action is brought, and the nec-

¹ Ward v. Whitney, 8 N. Y. 446; Sieff v. Shausenburgh, 10 Abb. Pr. 477, n.; see Cal. Code C. P., sec. 482.

² Thompson v. Blanchard, 3 N. Y. 335; Seacord v. Morgan, 17 How. Pr. 394; Coleman v. Bean, 14 Abb. Pr. 38. For definition of a seal, and how made, see Cal. Code C. P., secs. 1930, 1931.

³ Cal. Code C. P., sec. 482.

⁴ Askins v. Hearn, 3 Abb. Pr. 184; Bellinger v. Gardner, 2 Id. 441; Courter v. McNamara, 9 How. Pr. 255; Leffingwell v. Chave, 10 Abb. Pr. 472-477, n.

⁵ Republic of Mexico v. Arrangois, 11 How. Pr. 1.

essary undertaking having been given, I, the undersigned, judge of the said superior court, by virtue of the authority in me vested by law, do order and require you, the said sheriff of the county of, forthwith to arrest the said defendant if he be found in your county, and hold him to bail in said action in the sum of dollars, and that you return this order, with your proceedings thereon, to the clerk of the said superior court. on the day of, 18..

G. H., Judge.

[DATE.]

• § 4024. **Amount of Bail.**—In relation to the amount of bail, under the former practice, in actions for a money demand on contract, bail was required in double the amount of the claim; but this was subject to modification where the amount was large.¹ In other actions the bail is altogether in the discretion of the court, and depends upon the character of the action and the position of the defendants; whether, for example, residents or transient persons, etc.² In California the amount of the undertaking must be at least five hundred dollars.³ The undertaking must precede the order.⁴

§ 4025. **How Served.**—The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit; and also, if desired, a copy of the order of arrest.⁵ The sheriff must file them within ten days. The sheriff must execute the order by arresting the defendant, and keeping him in custody until discharged by law.⁶

§ 4026. **Name of Party.**—Formerly it was held that an arrest of a person by a wrong name could not be justified, though he was the person intended, unless he was as well known by one name as the other.⁷ But since the code it is not necessary that the name of the party to be arrested should be stated. If unknown, he may be designated as the real defendant in the suit or proceeding, and whose name is not known; or by any name.⁸

§ 4027. **Nature of Remedy.**—The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based

¹ Cromelines ads. Beldens, 1 Wend. 107; Ballingall v. Burnie, 1 Hall, 237.

² Baker v. Swackhamer, 3 Code R. 248.

³ Code C. P., sec. 482.

⁴ Id.

⁵ Cal. Code C. P., sec. 484; N. Y. Code, sec. 562.

⁶ Cal. Code C. P., sec. 485; N. Y. Code, sec. 563.

⁷ Mead v. Haws, 7 Cow. 332; Gurnsey v. Lovell, 9 Wend. 319.

⁸ Pinder v. Black, 4 How. Pr. 95.

must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process.¹ As a matter of practice, it is safest to award an arrest, even in cases of doubt, for the defendant is protected by his bond from abuse by the process, without which process the plaintiff may be remediless.²

§ 4028. **Order, by Whom Made—Requisites of.**—An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge.³ It must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.⁴ The order may be made whenever it shall appear to the judge by the affidavit of the plaintiff or some other person that a sufficient cause of action exists; and that the case is one of those mentioned in the statute.⁵ And may be made at the time of issuing the summons, or at any time afterwards before judgment.⁶ The order may be made returnable within a specified period after arrest, and it is not essential to name a certain day.⁷ Where the complaint was not filed until two days after an order of arrest had issued thereupon, it was held that the order of arrest was void.⁸

§ 4029. **Return of Order—Arrest of Defendant—Bail Given.**

Form No. 970.

[TITLE.]

[VENUE.]

I have taken and arrested the within-named C. D., whose body I have ready, as required by the within order.

A. C.,

Sheriff of County.

§ 4030. **Return—Defendant not Found.**

Form No. 971.

[VENUE.]

The within-named A. B. is not found in my county.

A. C.,

Sheriff of County.

¹ *Mattoon v. Eder*, 6 Cal. 57.

² *Southworth v. Resing*, 3 Cal. 377.

³ Cal. Code C. P., sec. 480. For an order under N. Y. Code, see secs. 551 and 556.

⁴ Cal. Code C. P., sec. 483; see N. Y. Code, sec. 561.

⁵ Cal. Code C. P., sec. 481.

⁶ *Id.*, sec. 483.

⁷ *Continental Bank v. De Mott*, 8 Bosw. 696; see Cal. Code C. P., sec. 483.

⁸ *Ex parte Cohen*, 6 Cal., 318.

§ 4031. **Return—One Arrested, the Other not Found.***Form No. 972.*

[VENUE.]

I have taken and arrested the within-named A. B., whose body I have ready, as required by the within order; but the within-named C. D. is not found in my county.

A. C.,

Sheriff of County.

§ 4032. **Return—Imprisoned for Want of Bail.***Form No. 973.*

[VENUE.]

I have taken and arrested the within-named C. D., who remains imprisoned in the common jail of the county of, in my custody, for want of bail.

A. C.,

Sheriff of County.

§ 4033. **Return—Arrest, and Escape by Rescue.***Form No. 974.*

[VENUE.]

I have taken and arrested the within-named C. D., as required by the within order, and safely kept him in my custody until divers persons, to me unknown, on the day of, 18.., at, with force and arms assaulted me, and out of my custody rescued said C. D., who then and there rescued himself and escaped out of my custody, and afterwards the said C. D. is not found in said county.

A. C.,

Sheriff of County.

§ 4034. **Return that Defendant has Made Deposit in Lieu of Bail.***Form No. 975.*

[VENUE.]

I have taken and arrested the within-named A. B., as required by the within order, and he has deposited with me dollars, in lieu of bail in the above-entitled action.¹

A. C.,

Sheriff of County.

§ 4035. **Clerk's Certificate that Deposit has been Paid into Court***Form No. 976.*

[TITLE.]

[VENUE.]

I, J. K., clerk of the county of, hereby certify that the sheriff of said county has deposited in this court the sum of

¹See Cal. Code C. P., sec. 486. If per cent, and ten per cent per month the sheriff omit to pay over the money interest: Cal. Pol. Code, sec. 4181. he is liable to a penalty of twenty-five

..... dollars, as having been paid him by C. D., the defendant, in lieu of an undertaking of bail in this action.¹

J. K.,

Clerk of County.

§ 4036. Certificate that Bail has been Given instead of Deposit.

Form No. 977.

[TITLE.]

[VENUE.]

I, A. K., sheriff of the county of, hereby certify that the defendant C. D. has deposited with me an undertaking, of which the within is a copy, in lieu and instead of the money heretofore deposited with me.

A. K.,

Sheriff of County.

§ 4037. Effect of Bail.—The defendant, on arrest, by putting in bail and neglecting to move to be discharged, consents to process, and waives all previous irregularities.²

§ 4038. Return to Order of Discharge on Supersedeas.

Form No. 978.

[VENUE.]

By virtue of the within order to me directed, I took the within-named defendant and safely kept him in my custody in the common jail of the county of, until afterwards, to wit, on the day of, 18.., by virtue of a certain other writ to me directed and delivered, and to this writ annexed, I caused the said defendant to be delivered out of the said jail; wherefore I can not have the body of the said defendant before the said superior court of the county of, state of, as within I am commanded.

J. K.,

Sheriff of County.

§ 4039. Return to Order of Delivery on Writ of Habeas Corpus.

Form No. 979.

[VENUE.]

By virtue of the within order, to me directed, I took and arrested the within-named defendant and safely kept him in my custody, in the common jail of the county of, until afterwards, to wit, on the day of, 18.., I received the writ of *habeas corpus cum causa*, commanding me to have the body of the said defendant before the justices of the supreme court of the state of California [or as the case may be], at, on the day of, then next

¹ Money deposited in court is to be paid over to the county treasurer, subject to the order of the court: California Code of Civil Procedure, sec. 2104.

² *Mattoon v. Eder*, 6 Cal. 57.

[or “immediately after the receipt of that writ”]. By virtue of which said writ, and in obedience thereto, I had the body of the said defendant with the said last-mentioned writ, and the return of the within cause in a certain schedule thereunto annexed, before the said justices of the supreme court of the state of California [or as the case may be], at the day and place in the said writ contained, who then received of me the body of the said defendant, and discharged him out of my custody [or “committed to the jail of the county of”], and altogether discharged and exonerated me from further keeping the said defendant.

Wherefore I can not have the body of the said defendant before the said superior court in the within order named, as I am therein commanded.

J. K.,

Sheriff of County.

§ 4040. Notice of Motion to Vacate Order of Arrest.

Form No. 980.

[TITLE.]

To E. F., plaintiff's attorney:

Please take notice, that on the day of 18.., at the court-room of said court, at the opening of the court, or as soon thereafter as counsel can be heard, the undersigned will move this court to vacate the order of arrest in this action. This motion will be based upon the affidavit hereto annexed, and upon the papers filed and served in this action, and said motion will be made for irregularity in this, that the undertaking given to procure said order was not filed with the clerk of the court [or otherwise], and for such other and further order as may be just.

[DATE.]

[SIGNATURE.]

§ 4041. **Conversion.**—In an action for a conversion an order of arrest is not to be vacated on mere denial of the cause of action.¹

§ 4042. **Facts must be Shown.**—It is well settled that the facts necessary to be shown must appear by the positive averments of the affidavits; and it is insufficient to refer to the complaint or to any other paper to show what the affidavit ought itself to disclose, although it is positively averred that such complaint or paper is true.²

§ 4043. **False Representations.**—A purchaser who obtains credit by a false representation must be held to intend the legitimate consequence of his acts; and if he admits the false

¹ *Cousland v. Davis*, 4 Bosw. 619.

² *McGilvery v. Morehead*, 2 Cal. 609.

representation, his denial of intent to defraud is immaterial. So held on motion to vacate arrest.¹

§ 4044. **Insufficient Ground.**—Although an order of arrest ought not to be granted upon general assertions made on information only, yet if such allegations are not met by a denial on a motion to discharge from arrest, they will be taken to be true.²

§ 4045. **Notice Essential.**—These motions must be on notice, and must be made in court, or may be before the judge who granted the order of arrest, if he is a judge of the court.³

§ 4046. **Parties.**—An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party.⁴

§ 4047. **Positive Denial, Effect of.**—Where, on motion to vacate an order of arrest, the affidavit of the plaintiff positively and unequivocally alleges the making of false representations by the defendant, which the affidavit of the latter as unequivocally and positively denies, the defendant's affidavit should be regarded as neutralizing that of the plaintiff, who should be left to make out his case by other or further proofs.⁵

§ 4048. **Renewal of Motion.**—After a defendant has moved to vacate an order, being founded on facts extrinsic to the cause of action, and his motion to vacate it being founded only on the plaintiff's original affidavits, if such motion is denied he should not be allowed to renew it upon opposing affidavits on his own part, especially where the order denying his motion has been affirmed on appeal.⁶

§ 4049. **Rule to Show Cause.**—On a rule to show cause why the arrest of a party, ordered by the court on an allegation of fraud, should not be vacated, the question of fact involved in it must be decided, like any other fact, by the weight of evidence.⁷

§ 4050. **Vacating Order and Reducing Bail.**—A defendant arrested may at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise,

¹ Whitcomb v. Salsman, 16 How. Pr. 533.

² Wolfe v. Brouwer, 5 Rob. 601.

³ Rogers v. McElhone, 12 Abb. Pr. 292; but see Cal. Code C. P., sec. 503.

⁴ Webber v. Moritz, 11 Abb. Pr. 13.

⁵ Allen v. McCrasson, 32 Barb. 662.

⁶ Lovell v. Martin, 12 Abb. Pr. 178.

⁷ Southworth v. Resing, 3 Cal. 378.

the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.¹

§ 4051. **When Order will be Vacated or Bail Reduced.**—If, upon such application, it appears that there was not sufficient cause for the arrest, the order shall be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.² An order of arrest should not be vacated on the ground that an action has been brought in a foreign court against the defendant for the same cause, it not appearing that any arrest was ever made there, or would have been allowed by the practice of such court.³

§ 4052. **Order Vacating Arrest.**

Form No. 981.

[TITLE.]

I. On reading and filing notice of motion and affidavit thereto annexed, and on the pleadings and proceedings in this action, on motion of E. F., counsel for the defendant, and after hearing thereon—

II. It is hereby ordered that the order of arrest granted in this action, on the day of, 18.., against the defendant, A. B., be vacated [and that the bail heretofore given for the defendant be exonerated from liability].

[DATE.]

[SIGNATURE.]

§ 4053. **Order, where Made.**—This order may be made at chambers by the judge who granted the original order. Otherwise it must be made at special term, in New York.⁴ The superior court is always open for the purpose of hearing motions of this character.⁵

§ 4054. **The Same—On Condition that Defendant shall not Sue.**

Form No. 982.

[TITLE.]

[Commencement as in last form.]

It is hereby ordered that on defendant's stipulating within days to bring no action for false imprisonment, said motion be granted, and the order of arrest heretofore granted in this action be vacated [or that the defendant be discharged from said arrest], with dollars costs to the defendant; otherwise, that said motion be denied without costs.⁶

¹ Cal. Code C. P., sec. 503; see N. Y. Code, secs. 567, 568.

² Cal. Code C. P., sec. 504.

³ *Arthurton v. Dalley*, 20 How. Pr. 311.

⁴ *Dunaher v. Meyer*, 1 Code R. 87; *Cayuga County Bank v. Warfield*, 13 How. Pr. 439; Cal. Code C. P., sec. 503.

⁵ Cal. Code C. P., sec. 76.

⁶ It will be observed by reference to the following authorities that a conditional order can be made, or rather that such have been made. Yet it would seem the party is either entitled or not entitled to a discharge.

§ 4055. **Conditional Discharge.**—The discharge may be granted conditionally upon the defendant's stipulating not to bring an action for the arrest.¹ So where the question involved in the motion to discharge the defendant is one involved in uncertainty, and about which there has been much diversity of opinion.²

§ 4056. **Order Reducing Amount of Bail.**

Form No. 983.

[TITLE.]

[Commencement as before.]

It is hereby ordered that the bail to be taken by the sheriff on the order of arrest of C. D. in this action be reduced to dollars.

§ 4057. **Notice of Motion to Discharge Defendant from Arrest—Another Form.**

Form No. 984.

[TITLE.]

To A. B., plaintiff's attorney:

Please take notice, that on the day of, 18..., at the court-room of said court, at the opening of the court, or as soon thereafter as counsel can be heard, the undersigned will move this court that the defendant C. D. be discharged from arrest in this action [or that the amount of bail required by the order of arrest in this action be reduced]. Said motion will be based on the affidavit, a copy of which is annexed, and upon all the papers filed and served in this action.

[DATE.]

[SIGNATURE.]

§ 4058. **Bail, how Given.**—The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest that the defendant will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.³

§ 4059. **Discharge.**—A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case.⁴ Where a party is once arrested and discharged, he can not be arrested again in the same action.⁵ A discharge

¹ Northern Railway Co. v. Carpenter, 4 Abb. Pr. 47.

² Alden v. Sarson, 4 Abb. Pr. 102; compare Merchants' Bank v. Dwight, 13 How. Pr. 366; and Croden v. Drew, 3 Duer, 652.

³ Cal. Code C. P., sec. 487; see N. Y. Code, sec. 575.

⁴ Soule v. Hayward, 1 Cal. 345.

⁵ McGilvery v. Morehead, 2 Cal. 607.

under the insolvent act, after judgment, precludes a second imprisonment for the same cause in a different form.¹ The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest.²

§ 4060. **Undertaking of Defendant-on-Arrest.**

Form No. 985.

[TITLE.]

Whereas, in a certain action in the superior court of the state of, in and for the city and county of, wherein A. B. is plaintiff and C. D. defendant, an order was duly made and delivered to the sheriff of the city and county of, requiring him forthwith to arrest the said defendant, and hold him to bail in the sum of dollars, and the said sheriff having arrested the said defendant and taken him into custody by virtue of the said order:

Now, therefore, we, L. M. and N. O., residing at, in the county of, the said L. M. by occupation ~~a~~ [merchant], and N. O., residing at, in the county of, by occupation a [carpenter], are jointly and severally bound in the sum of dollars, the amount in the said order of arrest mentioned, and promise and undertake that the said defendant shall at all times render himself amenable to the process of the said court during the pendency of the said action, and to such as may be issued to enforce the judgment therein; or that we will pay to the said plaintiff the amount of any judgment which may be recovered in the said action.

[DATE.]

[SIGNATURE AND SEALS.]

[Affidavit of qualification is in No. 967.]

§ 4061. **Justification of Bail.**—For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff touching his sufficiency, in such manner as the judge or county clerk, in his discretion, may think proper. The examination must be reduced to writing¹ and subscribed by the bail, if required by the plaintiff.² The sureties must answer fairly, and if from their refusal to answer pertinent and material questions, or otherwise it appear that they can not respond in the necessary amounts, they should be rejected.³

¹ Wright v. Ritterman, 1 Abb. Pr., N. S., 428; People v. Kelly, Id. 432.

² Cal. Code C. P., sec. 495.

³ Cal. Code C. P., sec. 486; N. Y. Code, sec. 573.

⁴ Mokelumne Hill Co. v. Woodbury, 10 Cal. 189.

§ 4062. **Justification of Bail.***Form No. 986.*

[TITLE.]

On this day of, 18..., before the undersigned, J. P., judge of [state the court; or G. H., the county clerk of the county of.....], personally appeared L. M. and N. O., the bail of the defendant C. D. in this action, to justify pursuant to notice; and the said L. M., being duly sworn, says [here state testimony, inserting, if desired, the questions and answers in form]. And said N. O., being duly sworn, says [etc., as above].

[SIGNATURE OF BAIL.]

§ 4063. **Allowance of Bail.**—If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability.¹

§ 4064. **Allowance of Bail.***Form No. 987.*

This day appeared before me the within-named L. M. and N. O., bail for the defendant C. D. in this action, and justified as such, and I find said bail to be sufficient, and allow the same.

[Or that L. M., merchant, of No. Front street, San Francisco, and N. O., banker, of No. Montgomery street, San Francisco, are proposed as bail in addition to [or in lieu of] R. S. and T. U., the bail already put in, and that they will justify.]

[DATE.]

[SIGNATURE.]

§ 4065. **Notice of Bail Justifying.***Form No. 988.*

[TITLE.]

To, plaintiff's attorney:

Please take notice that the bail in this action will justify before M. N., a justice of this court [or county judge, or the county clerk of county], at, on the day of next, at o'clock in thenoon.

[DATE.]

[SIGNATURE.]

§ 4066. **Notice of Justification.**—Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail [specifying the places of residence and occupations of the latter], before a judge of the court, or county judge, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, ex-

¹ Cal. Code C. P., sec. 496; N. Y. Code, sec. 581.

cept by consent of parties. In case other bail be given, there must be a new undertaking.¹

§ 4067. Notice of Exception to Bail.

Form No. 989.

[TITLE.]

To the sheriff of county:

Please take notice that the plaintiff does not accept the bail offered by the defendant C. D. in this action [and where there is objection to the undertaking], and further, that he excepts to the form and sufficiency of the undertaking.

[DATE.]

[SIGNATURE.]

§ 4068. Notice, Effect of.—A notice of exception to the sufficiency of the undertaking is not sufficient as a notice of exception to the sufficiency of the sureties.²

§ 4069. Qualifications.—The qualifications of bail are as follows: 1. Each of them must be a resident and householder, or freeholder, within the state; 2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge, or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.³

§ 4070. Service of Notice.—The plaintiff, within ten days after the return of the sheriff with a copy of the undertaking of bail, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.⁴

§ 4071. Surrender of Defendant.—At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.⁵ The sureties on the bail bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody.⁶ A

¹ Cal. Code C. P., sec. 493; N. Y. Code, sec. 578.

² Young v. Colby, 2 Code R. 68.

³ Cal. Code C. P., sec. 494; N. Y. Code, sec. 579.

⁴ Cal. Code C. P., sec. 492; N. Y. Code, sec. 577.

⁵ Cal. Code C. P., sec. 488; N. Y. Code, sec. 591.

⁶ Allen v. Breslauer, 8 Cal. 552.

surrender within ten days after execution is a sufficient compliance with the statute.¹ Where a party offered to surrender himself in discharge of his sureties, it was held to be a good surrender, and a discharge of the sureties from all liability.² Where the judgment is not such as will warrant a writ of *ca. sa.* to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor.³

§ 4072. **Authority to Arrest Principal.**

Form No. 990.

Know all men, etc., that I, L. M., the within-named bail, depute, authorize, and empower, in my place and stead, and in my behalf, O. P., of, sheriff of, to take, arrest, seize, and surrender C. D., the within-named defendant, in exoneration and discharge of my undertaking as bail for the said C. D. in said cause.⁴

[DATE.]

[SIGNATURE.]

§ 4073. **Authority to Arrest.**—For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or by a written authority, indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment, within ten days thereafter.⁵

§ 4074. **Certificate of Surrender.**

Form No. 991.

[VENUE.]

I, S. T., sheriff of the county of, hereby certify that C. D., the principal mentioned in the [within] undertaking [or, if not indorsed, refer to the undertaking so as to identify it], was surrendered to me by L. M. and N. O., his sureties, this day of, 18.., and remained in custody.

S. T.,

Sheriff of County.

¹ Allen v. Breslauer, 8 Cal. 552.

² Babb v. Oakley, 5 Cal. 93.

³ Matoon v. Eder, 6 Cal. 57.

⁴ For another form, see Nicolls v. Ingersoll, 7 Johns. 145. It is not

essential that all the bail unite in this instrument: In re Taylor, 7 How. Pr. 212.

⁵ Cal. Code C. P., sec. 489; N. Y. Code, sec. 593.

§ 4075. **Notice of Motion for Enlargement of Time to Surrender.**

Form No. 992.

[TITLE.]

[ADDRESS.]

Please to take notice that on the affidavit, a copy of which is herewith served, the undersigned will move this honorable court, on the day of next, at o'clock A. M., at, or as soon thereafter as counsel can be heard, that the undersigned, bail of the defendant C. D. in this action, have days further time to surrender the defendant to the sheriff in exoneration of the bail herein, and for such other or further order as may be just.

[DATE.]

[SIGNATURE.]

§ 4076. **Affidavit to Support Motion for Enlargement of Time for Surrender.**

Form No. 993.

[TITLE.]

[VENUE.]

L. M., being duly sworn, deposes and says:

I. I am one of the bail of the defendant C. D., in this action; that said C. D. was arrested on the day of, 18.., by virtue of an order of arrest, on the ground that [state the ground of arrest], and that on the day of, 18.., the deponent [and N. O.] became bail for said defendant by giving an undertaking, of which a copy is hereto annexed.

II. [State excuse for not having surrendered in season, and what means the bail took to ascertain where the principal was, and to effect his surrender.]

III. [State facts showing that a surrender is possible.]

IV. That no action has been commenced against the bail, as deponent is informed and believes.

[JURAT.]

[SIGNATURE.]

§ 4077. **Diligence.**—A general statement that the bail used the utmost exertions to effect the surrender is not enough.¹

§ 4078. **Exonerated by Death.**—The bail are exonerated by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process.²

¹ Baker v. Curtis. 10 Abb. Pr. 279.

² Cal. Code C. P., sec. 491.

CHAPTER II.

ATTACHMENT.

§ 4079. **In General.**—The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, in the manner provided by statute, in the following cases: 1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; 2. In an action upon a contract, express or implied, against a defendant not residing in this state.¹ The process of attachment is a creature of statute, and is a remedy only given in cases of indebtedness arising upon contract.² It is not a distinct proceeding in the nature of an action *in rem*, but is a proceeding auxiliary to an action at law, designed to secure the payment of any judgment the plaintiff may obtain.³ It has been held that where property in the hands of a third person is arrested on a claim to a specific lien upon it, that constitutes the suit a suit *in rem*; it is not a foreign attachment, whether the third person holds the property as owner of it in his own right or as trustee of the debtor.⁴ A judgment *in rem* binds the thing itself as against all the world, but in a case in which the law requires that parties shall be brought before the court, the sentence binds those only who are parties.⁵ The decisions here referred to were made under the peculiar statutes of the states where rendered. It is well settled that such proceedings are statutory and special, and must be strictly pursued, and when a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the attachment law.⁶

§ 4080. **When to Issue.**—An attachment issued before the issuance of the summons in the suit is void, and the subsequent

¹ Cal. Code C. P., sec. 537.

² Griswold v. Sharpe, 2 Cal. 17.

³ Low v. Adams, 6 Cal. 277.

⁴ Reed v. Hussey, 1 Blatch. & H. 525.

⁵ Mankin v. Chandler, 2 Brock. Marsh. 125.

⁶ Roberts v. Landecker, 9 Cal. 262; compare Fisher v. Consequa, 2 Wash. C. C. 382; Picquet v. Swan, 4 Mason, 443; James v. Jenkins, Hempst.

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issuance of the summons can not cure it.¹ Although under the California code a writ of attachment can not properly issue until after the commencement of the suit to which it is only auxiliary, still there seems to be no valid objection to a complete preparation of all the papers requisite to the writ before or at the same time the complaint is prepared, so that the affidavit and undertaking in attachment be not filed in advance of the original complaint, and the writ not issued in advance of the summons to which it is incident.² An attachment issued before the maturity of the debt is *prima facie* void as against a subsequent attachment.³ But where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors subsequently attaching can not complain that the suit was prematurely brought.⁴ The decision in this case goes upon the ground that the debt on which the attachment issued was equitably due, and hence does not conflict with the rule laid down here.⁵ An attachment issued upon a debt not legally or equitably due is void as against creditors whose rights are injuriously affected by it.⁶ And a subsequent attaching creditor can not, by intervention, postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action.⁷ An officer attached property claimed by A. under a sale from the defendant in an attachment suit. Judgment was recovered by the plaintiff in the attachment suit, and A. sued the officer: it was held that the officer might show that the sale to A. was in fraud of creditors.⁸ An express contract is one the terms of which are stated in words.⁹ An implied contract is one the existence and terms of which are manifested by conduct.¹⁰ Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes every man undertakes to perform.¹¹ If I employ a person to do any business for me, or perform any work, the law implies that I contracted to pay the real value of the services.¹² There must be a debt.¹³ "Direct" does not mean the opposite of "collateral." That would exempt sureties, guarantors, etc. It means that the debt must be liquidated.¹⁴ A bail bond in a criminal case is a contract for the direct payment of

¹ Low v. Henry, 9 Cal. 538.

² Wheeler v. Farmer, 38 Cal. 203.

³ Patrick v. Montader, 13 Cal. 434.

⁴ Id.

⁵ Davis v. Eppinger, 18 Cal. 378.

⁶ Id.

⁷ Coghill v. Marks, 29 Cal. 673.

⁸ Pease v. Anderson, 44 Ill. 218.

⁹ Cal. Civil Code, sec. 1620.

¹⁰ Id., sec. 1621.

¹¹ Bouv. Law Dict.

¹² 2 Bla. Com. 443.

¹³ Cal. Code. C. P., sec. 538.

¹⁴ Hathaway v. Davis, 33 Cal. 165.

money.¹ So is the official bond of a county treasury.² An attachment having been issued to compel the refunding of money paid by plaintiff on an agreement to build a certain machine, which had not been built, motion was made to dissolve because the facts alleged in the complaint did not state a cause of action "upon a contract, expressed or implied, for the direct payment of money:" it was held that the averment of the payment of money in advance, as a part of the contract price, and of the expiration of the time for performance of the contract having expired without its being fulfilled, is substantially an averment of failure and refusal to perform any part of the contract; and where money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it. This brings the case within the very terms of the statute defining the cases in which an attachment may issue.³

§ 4081. **Against Administrator.**—After the decree of distribution, money in the hands of the administrator, distributed to an heir or devisee, may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution.⁴

§ 4082. **Against Corporations, Domestic and Foreign.**—The code of procedure in New York does not authorize the issuing of an attachment as a provisional remedy against a domestic corporation.⁵ By the common law, foreign corporations and non-resident foreigners can not be served with process by any of the courts of common law, nor can their property be attached to compel their appearance. This authority results from special custom or statute provisions.⁶

§ 4083. **Against Sheriff.**—The ex-sheriff could only be garnished as a private individual.⁷

§ 4084. **Against Tenant in Common.**—Where V., a landowner, agreed with B. to let the latter work his land on shares, V. to receive one third of the grain, after it was in sacks, as his share, it was held that a sheriff, having an attachment against V., may levy on his interest in the grain; and, to effect this, may take and retain possession of the entire quantity of grain; but he can sell, under the execution on the judgment that may

¹ San Francisco v. Brader, 50 Cal. 506.

² Monterey Co. v. McKee, 51 Cal. 255.

³ Santa Clara Peat Fuel Co. v. Tuck, Cal. Sup. Ct. (No. 5,433), Dec. 1878.

⁴ Estate of Nerac, 35 Cal. 392.

⁵ Ferrier v. American Glass Silvering Co., 3 Abb. Pr., N. S., 419; but see N. Y. Code, ed. 1877, sec. 636.

⁶ M'Queen v. Middletown Mfg. Co., 16 Johns. 5; Clarke v. N. J. Steam Nav. Co., 1 Story, 531.

⁷ Graham v. Endicott, 7 Cal. 144.

be recovered in the action, only the individual one-third interest of V., the purchaser at the sale becoming tenant in common with B.¹ Where R. worked L.'s farm on shares for a term expiring October 1, 1866, and on that day L. took possession of one room in the house, leaving R. and his family living in the house as before, and commenced collecting pay for the pasturage of cattle on the farm, and the grain owned in common, having been threshed after the term, was placed in two separate bins in the barn, and while it was there R. sold his share, which was in one of the bins, to L., but there was no other delivery except that R., going with L. to the barn, said in the presence of a witness, "Here is the grain I have sold you," and R. continued to keep a key of the barn in which he also continued to keep his horse as before, it was held that there was no such delivery of the grain as to take the sale out of the statute of frauds, or protect the property as that of L. from attaching creditors of R.² Attachment in suit of B. & Co. against V., Y., and L., as firm of V. & Co., under which defendant as sheriff seized plaintiff's stock in trade, claiming that L. was partner of plaintiff: it was held that in an action by plaintiff against sheriff for damages, proof of injury to plaintiff's business as a merchant was inadmissible as a criterion of damages.³

§ 4085. **What may or may not be Attached—Assignment, Effect of.**—A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment.⁴ After the delivery and presentation of an order, the debt due by the drawee can not be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order is an effectual protection, as it is also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee.⁵ Plaintiff delivered to defendants gold-dust to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin, by garnishing defendants. De-

¹ Bernal v. Hovious, 17 Cal. 541.

² Lawrence v. Burnham, 4 Nev. 361.

³ Dexter v. Paugh, 18 Cal. 373.

⁴ Walling v. Miller, 15 Cal. 38.

⁵ Wheatley v. Strobe, 12 Cal. 92.

defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: it was held that the plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application to a case like this.¹ Notice to the judgment creditor of an assignment of chattels, where possession has never been taken under the assignment, does not affect the right of the sheriff to seize the property in execution as the property of the assignor. And it seems it does not render the creditor liable for directing the seizure of the goods.²

§ 4086. **Contingent Demand.**—A contingent demand, while the contingency exists, is not attachable.³ In Massachusetts, under the trustee laws, it has been held that the wages of a sailor, being contingent upon the arrival of the ship, are not a debt until the ship has arrived, and therefore, until then, are not attachable.⁴ Money due to a seaman for wages is not attachable in the hands of a purser.⁵ The law of Louisiana, although it allows an attachment in certain cases for debts not yet due, does not apply to debts resting in mere contingency, and is confined in its operations to absconding debtors.⁶

§ 4087. **Damages for Collision.**—In an action to recover damage for collision, there being no indebtedness arising upon contract, an attachment can not issue.⁷

§ 4088. **Debt.**—All debts due the defendant may be attached, in California.⁸ A debt due from a debtor not within the state, to a creditor also not within the state, is not liable to attachment in New York, although the evidence of the debt be within the state.⁹ Bonds of a railroad company, in hands of an agent to be sold, are not subject to attachment.¹⁰ Money in a savings bank is liable to garnishment, notwithstanding its by-laws,

¹ Walling v. Miller, 15 Cal. 38.

² Mecker v. Wilson, 1 Gall. 419.

³ Bates v. New Orleans etc. R. R. Co., 4 Abb. Pr. 72; S. C., 13 How. Pr. 516.

⁴ Wentworth v. Whittemore, 1 Mass. 471.

⁵ Buchanan v. Alexander, 4 How. U. S. 20; compare Averill v. Tucker, 2 Cranch C. C. 544.

⁶ Black v. Zacharie, 3 How. U. S. 483.

⁷ Griswold v. Sharpe, 2 Cal. 24.

⁸ Cal. Code C. P., sec. 541.

⁹ Story's Confl. Laws, secs. 362, 399; 10 Mass. 343; Bates v. New Orleans etc. R. R. Co., 4 Abb. Pr. 72; S. C., 13 How. Pr. 516.

¹⁰ Coddington v. Gilbert, 17 N. Y. 489.

assented to by the debtor, make his pass-book, in which his account is kept, transferable to order.¹ Equitable demands can not be garnished.²

§ 4089. **Equitable and Legal Demand.**—An equitable demand can not be garnished—garnishment reaches only legal debts, which the defendant in the attachment could enforce in his own name.³ Unless the defendant in the attachment could have maintained, under the practice at common law, an action of debt or *indebitatus assumpsit* against the garnishee at the time the process of garnishment was served upon him, the garnishee process does not make the garnishee liable to the plaintiff in the attachment.⁴ Where A. contracted with B., in writing, to construct a building for him, B. agreed to pay a certain sum therefor, payable in installments as the work progressed, and C. then contracted with A. to do a part of the work for a sum fixed to be paid in installments as his work progressed, and A. assigned to C. a part of the money to fall due on B.'s contract equal to the sum to be paid C., it was held that no such legal demand existed in favor of C. against B. as was liable to garnishment by C.'s creditor.⁵

§ 4090. **Foreign Debt.**—A debt due for merchandise sold in Boston to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the act of the twenty-ninth of April, 1851.⁶

§ 4091. **Goods in Transit.**—Goods in transit are not liable to attachment, in a suit against a corporation.⁷ This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee.⁸

§ 4092. **Lien of Contractor.**—The lien of a subcontractor filed, and notice given to the owner of a building, within thirty days after the completion of the work, under the act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, and before the filing and serving notice of lien.⁹

¹ Witte v. Vincenot, 43 Cal. 325.

² Hassie v. G. I. W. U. Cong., 35 Cal. 378.

³ Id.

⁴ Id.

⁵ Id.

⁶ Dutton v. Shelton, 3 Cal. 206.

⁷ Bates v. New Orleans etc. R. R. Co., 4 Abb. Pr. 72; S. C., 13 How. Pr. 516.

⁸ Blackman v. Pierce, 23 Cal. 508.

⁹ Tuttle v. Montford, 7 Cal. 353.

§ 4093. **Money in Bank.**—The cashier of a bank is not liable as garnishee of the deposit by the debtor, for the cashier is not the debtor of the depositor.¹ An agent deposited money of his principal in his own name. The fund was attached by a creditor of the agent, and immediately afterwards notice of ownership was given by the principal: it was held that the attaching creditor was in no better position than the agent making the deposit.²

§ 4094. **Money in Custody of the Law.**—Money deposited with the sheriff by a defendant, to procure the release of an attachment, is in the custody of the law; but when the parties, by a mutual agreement, take it out of the hands of the sheriff, without any order or permission of court, and loan it out to third parties, these parties are not the bailees of the sheriff, and the money ceases to be in the custody of the law, and can only be reached on proceedings supplementary to execution, in the same manner as other debts are reached.³ Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment.⁴ Property in the custody of the law, or in the hands of a receiver appointed by a competent court, is not liable to seizure, without an order from the court having the charge thereof.⁵

§ 4095. **Money in Hands of Bailee.**—A party placing money in the hands of another, for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited;⁶ nor does he part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal.⁷ Nor can an attaching creditor of the bailee, levying on the money in the hands of a stakeholder, with whom it has been deposited by the bailee, claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished.

¹ Lewis v. Smith, 2 Cranch C. C. 571.

² Farmers' and Mechanics' Nat. B'k v. King, 57 Pa. St. 202.

³ Hathaway v. Brady, 26 Cal. 586.

⁴ Clymer v. Willis, 3 Cal. 363.

⁵ Yuba Co. v. Adams, 7 Cal. 35; Adams v. Haskell, 6 Id. 113; but see Adams v. Woods, 9 Id. 28.

⁶ Hardy v. Hunt, 11 Cal. 343.

⁷ Id.

The creditor has not been misled by acts or declarations of the bailor, nor had he given credit to the bailee by reason thereof.¹

§ 4096. **Mortgage Lien or Pledge.**—The policy of the law is that a creditor holding a security by way of “mortgage, lien, or pledge upon real or personal property,” shall not resort to the summary process of attachment until he has exhausted his security. But such lien or pledge must be of a fixed, determined character, capable of being enforced with certainty, and depending on no conditions.² The possessory right of a mortgagor may be attached, but when the possessory right fails, the right to detain under the attachment ceases.³ The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession, as against the mortgagee, until foreclosure.⁴ But before the mortgaged property is taken under the attachment, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or deposit the same with the county clerk or treasurer.⁵ The proceeds of the property when sold must be applied first to the repayment of the sum paid to the mortgagee, with interest.⁶

§ 4097. **Partnership Property.**—Upon an attachment against the property of one of several copartners, the sheriff may seize the leviable property of the copartnership, take it into possession, and sell defendant's interest in so much thereof as is necessary.⁷ A levy on the partnership property where some of the partners were non-residents was sustained.⁸ An attachment against partnership property is unauthorized unless grounds for issuing it exist against all the partners.⁹

§ 4098. **Pledged Property.**—By the laws of Indiana all the interest of a mortgagee, pledgee, or assignee of personal property is liable to be levied on and sold by execution, and the same interest may be reached by an attachment.¹⁰ Under the laws of Massachusetts property pledged, and on which the party has a lien, is not liable to the trustee process of attachment.¹¹ The pledgee has a special property in the pledge, and is not

¹ Hardy v. Hunt, 11 Cal. 343.

² Porter v. Brooks, 35 Cal. 199.

³ Fairbanks v. Bloomfield, 5 Duer, 434.

⁴ Halsey v. Martin, 22 Cal. 645; see also Cal. Civil Code, sec. 2968.

⁵ Cal. Civil Code, sec. 2969.

⁶ Id., sec. 2970.

⁷ Phillips v. Cook, 24 Wend. 389; 2 Hill, 47, note; Burgess v. Atkins, 5 Blackf. 337; 15 Johns. 179; Drake on

Att., sec. 237; Goll v. Hinton, 8 Abb. Pr. 120; Hergman v. Dettlebach, 11 How. Pr. 46; Matter of Smith, 16 Johns. 102.

⁸ Brewster v. Honigsburger, 2 Code R. 50.

⁹ Edwards v. Hughes, 20 Mich. 289.

¹⁰ Evans v. Darlington, 5 Blackf. 320; Gibson v. Stevens, 3 McLean, 551.

¹¹ Badlam v. Tucker, 1 Pick. 389.

bound to deliver it until his encumbrance is discharged.¹ So of goods consigned as security.² So of the holder of warehouse receipts.³ Yet if the lien be removed by the lienor, the objection does not lie in the mouth of the debtor.⁴ So in Maine a mortgagee may waive his lien, and attach the same property, in a suit at law.⁵ Chattels in possession of a pledgee, goods in possession of a consignee, can not be attached for a debt of the pledgor.⁶ Under the provisions of the California statute, while the interest of a pledgor of property is subject to execution, and may be reached in the hands of the pledgee, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge.⁷

§ 4099. **Promissory Note.**—The indebtedness of a maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be.⁸ Nor can such indebtedness, after the maturity of the note, be attached unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment.⁹

§ 4100. **Property.**—All property of the defendant, in this state, not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.¹⁰ But property of a deceased debtor is not liable to attachment.¹¹

§ 4101. **Shares of Stock.**—The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, may be attached.¹² Where shares of stock in a corporation have been regularly transferred as a security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, in order to attach his interest in the corporation.¹³ In such a case, the corporation is no longer privy to the interest of the mort-

¹ Picquet v. Swan, 4 Mason, 443.

² Abb. on Shipping, 216; Long on Sales, 293; Grove v. Brien, 8 How. U. S. 429.

³ Wilkes v. Ferris, 5 Johns. 335; Plensants v. Pendleton, 6 Rand. 473; Ricker v. Cross, 5 N. H. 571; Gartney v. Howland, 2 Pick. 599; 2 Kent's Com. 499; Story on Sales, sec. 311; see also Gibson v. Stevens, 8 How. U. S. 384; Balderston v. Manro, 2 Cranch C. C. 623.

⁴ Meeker v. Wilson, 1 Gall. 419.

⁵ Whitney v. Farrar, 51 Me. 418.

⁶ Brownell v. Carnley, 3 Duer, 9; Kuhlman v. Orser, 5 Id. 242.

⁷ Treadwell v. Davis, 34 Cal. 601.

⁸ Gregory v. Higgins, 10 Cal. 339.

⁹ Id.

¹⁰ Cal. Code C. P., sec. 541.

¹¹ Patterson v. McLaughlin, 1 Cranch C. C. 352; Redfern v. Rumney, Id. 300; Henderson v. Henderson, 5 Id. 469. As to what property is exempt from attachment, see Execution, *post*.

¹² Cal. Code C. P., sec. 541.

¹³ Edwards v. Beugnot, 7 Cal. 162.

gagor, which is a mere equity in the hands of the mortgagee.¹ Money in the hands of one corporation, a stockholder in another corporation, the legal title to which is in the latter, may be attached at the instance of a creditor of the latter.²

§ 4102. **Securities.**—A creditor who holds, as security, an assignment from his debtor of a claim in favor of the debtor and against a third person, is not “a debtor” of the debtor.³ In this state, taking a bill before maturity as collateral security changes the legal rights of the parties, as it operates as a surrender by the creditor of the right to attach the property of the debtor, and this surrender is a sufficient consideration for the security.⁴ A bill of exchange may be regarded as an assignment of the funds in the drawee’s hands upon which it is drawn, and an attachment against the payee of the bill, levied on the funds, will not bind them against an indorsee of the bill suing to recover thereon in the name of the payee.⁵ A draft by the defendant upon the garnishee, in favor of a third person, before the attachment, is an assignment to the payee of the amount stated in the draft, and should be preferred to an attachment.⁶ The attaching creditor is in no better condition than his debtor would have been in if the attachment had not been made.⁷

§ 4103. **Vendor’s Lien.**—A vendor’s lien for the unpaid purchase price of a tract of land, where the land has been conveyed by the vendee to a third party before action brought against the former by the vendor to recover said purchase price, is not of such fixed and determinate character as to bar the plaintiff in such action of the right to a writ of attachment against the property of the defendant therein.⁸ If the plaintiff has a vendor’s lien to secure his debt on real property out of the state, an attachment can not issue.⁹ The vendor of real estate can not take out an attachment for unpaid purchase money if he can enforce a lien for such purchase money. It matters not whether such a lien is one which courts of equity will enforce in favor of a vendor, or whether it is one created by contract.¹⁰ An attachment can not issue when the plaintiff has a lien to secure his debt, and it matters not whether the

¹ Edwards v. Beugnot, 7 Cal. 162.

² Hughes v. Oregonian R’y Co., 1 West Coast Rep. 689.

³ Deacon v. Oliver, 14 How. U. S. 610.

⁴ Naglee v. Lyman, 14 Cal. 450.

⁵ Corser v. Craig, 1 Wash. C. C. 424.

⁶ Sergeant on Att. 89; United States

v. Vaughan, 3 Binn. 394; Bank of N. A. v. McCall, Id. 338; 4 Cranch U. C. 150.

⁷ Miller v. Hubbard, 4 Cranch U. C. 451.

⁸ Porter v. Brooks, 35 Cal. 199.

⁹ Hill v. Grigsby, 32 Cal. 55.

¹⁰ Id.; see Porter v. Brooks, 35 Cal. 199.

lien is one recognized by courts of equity, or is one of statutory origin and resting in contract.¹

§ 4104. **Affidavit for Attachment against Resident.**

Form No. 994.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action.

II. The defendant in the said action is indebted to me in the sum of dollars, lawful money of the United States, over and above all legal set-offs and counter-claims, upon an express [or implied] contract for the direct payment of money, to wit [state contract briefly], and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property.

III. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant.

[JURAT.]

[SIGNATURE.]

§ 4105. **The Same—When Debt Originally Secured.—**

If the debt was originally secured by a mortgage, lien, or pledge, after the averment “that the contract was made and is payable in this state,” add “that the payment of the same was originally secured by a chattel mortgage upon the said furniture so sold by the plaintiff to the defendant as above stated, but that the said furniture was afterward, to wit, on or about the day of, 18.., without any act or fault of the plaintiff, totally destroyed by fire.” If the debt was originally secured by a mortgage or lien upon real estate, the affidavit must show that fact, giving such description of the lien, as well as of the real estate, as will be sufficient for identification, as well as to show that it was of such character as could be lost or destroyed in the manner stated in the affidavit. These facts should be shown not merely stated in the language of the statute.

§ 4106. **Affidavit against Resident.—**The affidavit for an attachment against a resident must state: 1. That the defendant is indebted to the plaintiff (specifying the amount over and above all legal set-offs or counter-claims), upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal

¹ Hill v. Grigsby, 32 Cal. 55; see Porter v. Brooks, 35 Id. 199.

property, or if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; 2. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.¹

§ 4107. **Before Whom Sworn.**—It is not a ground for vacating an attachment that the affidavit on which it was obtained was sworn to before a commissioner in another state, but that no certificate of the secretary of state was obtained, as required by the law of that state. The omission may be supplied.²

§ 4108. **Bona Fide Existing Debt.**—The fact that an affidavit for an attachment omits to aver that the sum for which the writ is asked is “an actual, *bona fide*, existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the debtor,” does not render the attachment issued a nullity as against subsequent attaching creditors.³ An appeal bond is a contract for the direct payment of money, within the meaning of the statute.⁴ So is a bail bond in a criminal case.⁵ So is the official bond of a county treasurer.⁶ “Direct” implies that the debt must be liquidated.⁷

§ 4109. **Contract, how Stated—Requisites of Affidavit.** An affidavit alleging the contract to be “express or implied” is insufficient.⁸ The affidavit need not state the probative facts necessary to establish the ultimate facts required by the statute to be shown as the basis of the writ.⁹ An affidavit which alleges that the plaintiff’s demand is on a contract for the direct payment of money, with the further allegation of how the debts accrued, sufficiently states the nature of the demand.¹⁰ It is the duty of the clerk to issue the writ upon the plaintiff filing an affidavit stating the ultimate facts in the language of the statute.¹¹ The clerk performs only a ministerial duty in obedience to a plain statutory mandate.¹² An affidavit to obtain the issue of an attachment under the code of civil procedure need not allege that the defendants have property within the state, nor that the summons has been issued. It is sufficient if

¹ Cal. Code C. P., sec. 538.

² Lawton v. Kiel, 51 Barb. 30.

³ Fridenberg v. Pierson, 18 Cal. 152.

⁴ Hathaway v. Davis, 33 Cal. 161.

⁵ S. F. v. Brader, 50 Cal. 506.

⁶ Monterey Co. v. McKee, 51 Cal. 275.

⁷ Hathaway v. Davis, 33 Cal. 161.

⁸ Hawley v. Delmas, 4 Cal. 195.

⁹ Wheeler v. Farmer, 38 Id. 215.

¹⁰ Bowers v. London Bank, 3 West Coast Rep. 255.

¹¹ Id.

¹² Id.; see also Weaver v. Hayward, 41 Cal. 118.

the summons is issued when the attachment is obtained, and if both are delivered to the sheriff together.¹ It is settled, in Ohio, that where the ground relied on is stated substantially in the language of the statute, and sworn to positively, this is sufficient to authorize the allowance of the attachment by the judge.²

§ 4110. **Affidavit for Attachment against Non-resident.**

Form No. 995.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action.

II. The defendant in the said action is indebted to the said plaintiff in the sum of dollars, over and above all legal set-offs and counter-claims, and the said defendant is a non-resident of this state.

III. The sum for which the attachment is asked in the said action, that is to say, the amount of indebtedness which is above stated, is an actual, *bona fide*, existing debt, due and owing from the said defendant to the said plaintiff, and the said attachment is not sought and the said action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendant.

§ 4111. **Affidavit against Non-resident.**—1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims), and that the defendant is a non-resident of the state; and 2. That the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant.³

§ 4112. **Undertaking on Attachment.**

Form No. 996.

[TITLE.]

I. Whereas the above-named plaintiff has commenced or is about to commence an action in the superior court of the state of, in and for the county of, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of dollars, besides interest, and he is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

¹ Lawton v. Kiel, 51 Barb. 30.

² Harrison v. King, 9 Ohio St. 388; Gans v. Thompson, 11 Id. 579.

³ Cal. Code C. P., sec. 538.

II. Now, therefore, we, the undersigned, residents and householders of the county of, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of dollars, and promise to the effect that if the said defendant recover judgment in said action the said plaintiff will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of dollars.

[DATE.]

[SIGNATURES AND SEALS.]

State of California, }
city and county of } ss.

L. M. and N. O., the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says:

I am a resident of this state and a freeholder [or householder] therein, and am worth the sum in the said undertaking specified, as the penalty thereof, over and above all my just debts and liabilities, exclusive of property exempt from execution.

[JURAT.]

[SIGNATURES.]¹

§ 4113. **Joint and Several.**—On joint and several bonds each signer is bound without the signatures of the others named as obligors, unless at the time of executing the bond he declared he would not be bound without such signatures obtained.²

§ 4114. **To Whom Payable.**—It is no objection to an undertaking on attachment that it is made payable to the people of the state of California instead of to the defendant in the suit, as the latter can sue thereon in his own name.³ A mistake in the recital of the bond, as to the amount for which attachment issued, may be explained and corrected by parol.⁴ Upon a dismissal of the action, the clerk must deliver the bond to the defendant.⁵

§ 4115. **Undertaking Required.**—Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the under-

¹ For another form, consult *Gasherie v. Apple*, 14 Abb. Pr. 64.

² *Sacramento v. Dunlap*, 14 Cal. 421.

³ *Taaffe v. Rosenthal*, 7 Cal. 514.

⁴ *Palmer v. Vance*, 13 Cal. 556.

⁵ Cal. Code C. P., sec. 581, subd. 1.

taking.¹ The state or state officers are not required to give undertaking in suits, under the provisions of this act.²

§ 4116. **When Action Lies on the Undertaking.**—If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555 of the California code, or he may proceed as in other cases upon the return of an execution.³ The complaint in an action on an undertaking, given under section 540 of the California code of civil procedure, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that it was given to prevent a levy.⁴

§ 4117. **When Void.**—An attachment bond executed after the writ had been levied and the attachment dismissed is void;⁵ as the undertaking should precede the writ and accompany the affidavit.⁶ And in suit on a void bond, the obligee can not recover for injury sustained by the attachment.⁶ Where the undertaking given on issuing an attachment from a justice's court was to the effect that plaintiff would pay all costs, etc., and the damages the defendant might sustain by reason of the attachment, "not exceeding one hundred dollars," it was held that the undertaking was bad, and rendered the attachment void, because not issued in substantial conformity with the provisions of the statute, which required an undertaking that plaintiff would pay all damages which defendant might sustain by reason thereof without limitation as to amount.⁷

§ 4118. **Writ of Attachment.**

Form No. 997.

[TITLE.]

The people of the state of California,
To the sheriff of the county of, greeting:

I. Whereas the above-entitled action was commenced in the superior court of the state of, in and for the county of, by the plaintiff in the said action, to recover from the defendant in the said action the sum of dollars, besides interest at the rate of per cent per month, from the day of, 18 . . . , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law:

¹ Cal. Code C. P., sec. 539.

² Id., sec. 1058. ³ Id., sec. 552.

⁴ McNamara v. Hammerslag, 1 West Coast Rep. 560; McCutcheon v. Weston, Id. 850.

⁵ Benedict v. Bray, 2 Cal. 251.

⁶ Id.

⁶ Id.

⁷ Hisler v. Carr, 34 Cal. 641.

II. Now we do therefore command you, the said sheriff, that you attach and safely keep all the property of the said defendant within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendant give you security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness, Hon., judge of the said superior court, this . . . day of, 18..

Attest my hand and the seal of said court, the day and year last above written.

C. D., Clerk,

By E. F., Deputy Clerk.

§ 4119. Indorsement on Copy of Writ of Attachment.

Form No. 998.

SHERIFF'S OFFICE,
CITY AND COUNTY OF SAN FRANCISCO, }
August . ., 18.. }

To A. B.:

Please take notice that all moneys, goods, credits, effects, debts due or owing, or any other personal property, or all stocks or shares, or interest in stock or shares, of the company, in your possession or under your control, belonging to the within-named defendants, or either of them, are attached by virtue of a writ, of which the within is a copy, and you are notified not to pay over or transfer the same to any one but myself.

Please furnish a statement.

C. D., Sheriff,

By E. F., Deputy Sheriff.

§ 4120. **Effect and Form of Writ.**—A writ of attachment is effectual to change the title of personal property only from the time of levy.¹ The lien of an attachment, having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successors.² A warrant of attachment issued in a pending action should not be set aside because the warrant, after stating the existence of the cause of action, does not state that the action is pending. If the facts are sufficient, the warrant is not void for omitting to state one of them.³

¹ *Taffts v. Manlove*, 14 Cal. 47.

² *Adams v. Woods*, 9 Cal. 29.

³ *Lawton v. Kiel*, 51 Barb. 30. To

whom addressed and what to state,
see Cal. Code C. P., sec. 540.

§ 4121. **Issuance of Attachment.**—It is the duty of the clerk of the court to issue the writ upon the filing by the plaintiff of an affidavit, stating the ultimate facts in the language of the statute, together with an undertaking in the amount and form as defined by statute, and the clerk has no discretionary power, but performs a ministerial duty.¹ The affidavit need not state the probative facts necessary to establish the ultimate facts required by the statute to be shown as the basis of the writ.² It is the duty of the clerks of the courts to issue and deliver to the parties respectively, or to their attorneys, writs of attachment in the order in which the preliminary papers are presented to them, and the writs demanded.³ While he is bound to issue writs of attachment in the order in which they are demanded, yet if the party who makes the first demand is not in attendance to receive his writ when completed, the clerk is not bound in the mean time to delay the issuing of other writs against the same party.⁴ When the clerk has prepared for delivery the writ first demanded, he is bound to issue the writ of the next comer; and if in such case the first comer is not there to receive his writ, and for that reason the next comer first delivers his writ to the sheriff, and by that means acquires a priority, and the first comer loses his debt, the clerk is not liable.⁵ If the clerk first issue the writ of attachment secondly demanded, but if, notwithstanding, he has the writ first demanded prepared and ready for delivery as soon as it is called for, he is not liable for the damages sustained by the first party, because the second obtains the first levy.⁶

§ 4122. **Service of Attachment.**—Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.⁷ No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the sheriff under either writ, will discharge such sheriff from liability. The statute is express that such instruction must be in writing;⁸ since the proceeding by attachment is in derogation of the common law, and the service of the writ must conform to

¹ Wheeler v. Farmer, 38 Cal. 215.

² Id.

³ Lick v. Madden, 25 Cal. 205.

⁴ Lick v. Madden, 36 Cal. 208.

⁵ Id.

⁶ Id.

⁷ Cal. Code C. P., sec. 543.

⁸ Sanford v. Boring, 12 Cal. 539.

the statute authorizing it, or the judgment upon it is erroneous.¹ Attachments are governed by the same rules as executions with respect to liability of officers and parties levying and causing to be levied.² So with respect to their effecting no lien as against a *bona fide* purchaser before actual service or levy.³

§ 4123. **On Corporation.**—An attachment of credits in the hands of a corporation may be served by notice to their clerk.⁴ Under subdivision 5 of section 542, California code of civil procedure, service to be made on the “agent” of a corporation must be on the “managing agent,” as required in the fourth subdivision of the same section. At common law, service of process on a corporation must be made on the president or principal officer.⁵

§ 4124. **Diligence of Sheriff.**—It is the duty of an officer after he has once entered upon the execution of an attachment to complete its execution with diligence.⁶ Where one writ of attachment was placed in the sheriff’s hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter-past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o’clock Monday morning, the sheriff was not guilty of negligence in executing the first, no special circumstances being shown.⁷ Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because the defendant is about to leave the state, or remove his property, and the like.⁸ The mere omission of a deputy to inform the sheriff of having a process in hand is not such negligence as to charge the sheriff in case a writ last in hand was executed first.⁹

§ 4125. **On Personal Property.**—A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in the course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt.¹⁰ The service upon the defendant, in an action to recover money, of a writ of attachment, at the suit of

¹ James v. Jenkins, Hempst. 189.

² Gilbert v. Rounds, 11 How. Pr. 46; Burgess v. Atkins, 5 Blackf. 337; 6 Munf. 110; Drake on Att., sec. 237; Fairbanks v. Bloomfield, 5 Duer, 434; Goll v. Hinton, 8 Abb. Pr. 120.

³ Kuhlman v. Orser, 5 Duer, 242.

⁴ Davidson v. Donovan, 4 Cranch C. 578.

⁵ Angell and Ames on Corp., sec.

637; 1 Tidd’s Pr. 116; Kennedy v. Hibernia Sav. and Loan Society, 38 Cal. 161.

⁶ Wheaton v. Neville, 19 Cal. 41.

⁷ Whitney v. Butterfield, 13 Cal. 335.

⁸ Id.

⁹ Id.

¹⁰ Sanford v. Boring, 12 Cal. 539.

a third person against a plaintiff, can not be pleaded by the defendant in bar of a recovery. The only effect of the service of the attachment is to suspend the proceedings until the determination of the suit in which it is issued.¹

§ 4126. **Presumption of Regularity.**—Where a substitute sheriff (elisor) was appointed, and the pleadings did not show that there was no sheriff or coronor, or that these officers were disqualified, it was held that the appointment being made by a judge having competent jurisdiction, the presumption of the law is that he faithfully performed his duty.² The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient *prima facie* to show a due and proper execution of the writ.³

§ 4127. **Principal and Agent.**—The assent of an ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the sheriff, who holds an execution against a third person, in levying it upon property in the possession of the principal in her absence.⁴

§ 4128. **Real Estate, how Attached.**—The California statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained.⁵ Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied.⁶ Formerly the deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties.⁷ It is not under the present statute. Now a notice that it is attached must also be filed.⁸ The lien of attachment of real property is not perfected until both the acts described by statute, to wit, delivery to the occupant of a copy of the writ, or posting a copy upon the premises if there be no occupant, and the filing of a copy with the recorder, together with a description of the property attached, are performed. The omission of either act is fatal to the creation of the lien.⁹ The lien of an attaching creditor of real estate takes effect immediately upon the levy of

¹ Pierson v. McCahill, 21 Cal. 122.

² Turner v. Billagram, 2 Cal. 520.

³ Ritter v. Scannell, 11 Cal. 248.

⁴ Fitch v. Brockmon, 2 Cal. 575.

⁵ Ritter v. Scannell, 11 Cal. 238.

⁶ Id.; O'Connor v. Blake, 29 Cal. 312.

⁷ Ritter v. Scannell, 11 Cal. 238.

⁸ Cal. Code C. P., sec. 542, subd. 1 and 2; see also Main v. Tappener, 43 Cal. 209.

⁹ Wheaton v. Neville, 19 Cal. 41.

the attachment and the deposit of a copy of the writ, together with a description of the land attached, with the county recorder.¹ Such lien can not be divested by the failure of the sheriff to make a proper return of the writ.

§ 4129. **Priority of Attachment Liens.**—The purpose of an attachment is to hold the property of the defendant as security for such judgment as may be rendered.² And when the judgment is rendered and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment.³ This is confined to real property, as the judgment does not constitute a lien upon personal property; the prior attachments become liens in the nature of a legal estate vested in the sheriff for the benefit of the creditors.⁴ Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterward the party claiming the property obtained judgment against the sheriff for the value of the property, it was held that recourse must be had against the first attaching creditor for whose benefit the property was sold.⁵ They do not stand in the position of joint trespassers, the seizure of the second being subject to the first.⁶ The sheriff was the separate agent of both attaching creditors, but in the order stated, and as he disposed of the property for the benefit of the first alone, he must look to him and not to the second attaching creditor.⁷ It is the duty of the sheriff to apply the money in the order of the attachments; he has no right to go back of the process and raise the question as to the validity of the attachments.⁸

§ 4130. **Conflict of Laws.**—By the law of New York, an unrecorded mortgage is valid against third persons; by the law of Illinois, it is not. A., B., and C. were citizens and residents of New York. A., being indebted to both B. and C., and owning certain chattels in Illinois, mortgaged them to B.; but before the mortgage could be recorded or the goods delivered in the latter state, C. issued an attachment in Illinois, and levied

¹ Ritter v. Scannell, 11 Cal. 238.

² Cal. Code C. P., sec. 537.

³ Bagley v. Ward, 37 Cal. 131.

⁴ Patrick v. Montader, 13 Cal. 444.

⁵ Davidson v. Dallas, 8 Cal. 227.

⁶ Id.

⁷ Id.

⁸ McComb v. Reed, 28 Cal. 281.

on and subsequently sold the goods. B. sued C. in the New York courts for taking and converting the goods sold in that attachment suit: it was held that the attaching creditor had precedence over a mortgagee, and that the judgment in the attachment suit was a bar to the action in New York.¹

§ 4131. **Diligence Governs the Equities.**—In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity can not be taken advantage of by a stranger to an action in which it occurs.² Where there are several attachments, the attachment first served on the garnishee binds the effects in his hands, although the marshal has prior attachments in his hands at the time of such service.³

§ 4132. **Separate Creditor.**—A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. Neither by his attachment nor by the agreement did the separate creditor acquire any title to or lien upon the property as against the superior equity of a subsequently attaching creditor of the partnership.⁴ The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution.⁵

§ 4133. **Firm Creditor's Lien.**—Where one partner buys out his copartners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first.⁶ A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution.⁷ Where G. & Co., concealing their insolvency, obtained an extension from their creditor, B., and before the

¹ Green v. Van Buskirk, 7 Wall. C. C. 200; Grigsby v. Love, Id. 138. 413.

² Dixey v. Pollock, 8 Cal. 570.

³ McCobb v. Tyler, 2 Cranch C. C. 199; Johnson v. Griffith, Id. 199; but compare Violette v. Tyler, 2 Cranch

⁴ Burpee v. Bunn, 22 Cal. 194.

⁵ Adains v. Woods, 9 Cal. 24.

⁶ Conroy v. Woods, 13 Cal. 626.

⁷ Id.

maturity of the notes, B., apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained, by an arrangement with G. & Co., an antedated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co., it was held that B.'s attachment and claim was valid against the subsequent attaching creditors, the case not being one either of actual or constructive fraud.¹

§ 4134. **Fraudulent Attachment.**—Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit can not claim priority over the attachments preceding his on the ground that by his superior diligence the fraud has been discovered.² A junior attaching creditor can not take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor.³

§ 4135. **Irregular Process.**—Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of the plaintiff, but no name signed to it till next day, and after other attachments on the same property, when it was signed by the clerk, with the name of plaintiff's attorney, it was held that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void.⁴ The issue of an attachment, and the levy of the same on goods, if there is a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized.⁵ An attachment, regular upon its face, is not void because the complaint does not set up a cause of action which warrants the issuance of an attachment.⁶

§ 4136. **Return—Attachment Personal Property.**

Form No. 999.

SHERIFF'S OFFICE,

Of the City and County of San Francisco.

By virtue of the annexed writ I duly attached all moneys, goods, credits, effects, debts due or owing, and all other personal property [or all stock or shares, or interest in stocks or shares, of the company], belonging to the defendants

¹ Brewster v. Bours, 8 Cal. 501.

² Patrick v. Montader, 13 Cal. 424.

³ Fridenberg v. Pierson, 18 Cal. 152.

⁴ Dixey v. Pollock, 8 Cal. 570.

⁵ Kohler v. Wells, 26 Cal. 606.

⁶ McComb v. Reed, 28 Cal. 281.

therein named [or to either of them], in the possession or under the control of the parties hereinafter named, by serving upon each of them respectively, personally, in the county of, at the times set opposite their respective names, a copy of said writ, with a notice in writing that such property was attached in pursuance of said writ, and not to pay over or transfer the said property to any one but myself. Statement demanded. [Annex names of parties served, time of service, and answers of parties served.] S. T., Sheriff.

By D. S., Deputy Sheriff.

[DATE.]

§ 4137. **Amendment of Return.**—This return can not be amended where a third party has acquired an interest adverse to the attachment.¹ But a mistake in the date of a sheriff's return may be amended at any time.²

§ 4138. **Return Conclusive.**—The sheriff's return is conclusive against the plaintiff, and his action must be for a false return.³ Where a writ of attachment was issued on the twenty-sixth of August, and a copy delivered to the occupant of the premises, or posted upon them, on the twenty-ninth of that month, and on the same day the writ was returned, with a certificate of the sheriff's proceedings, and filed in the clerk's office, but no copy of the writ, with a description of the property, was filed with the recorder until the ninth of September following, it was held that after the return of the writ to the clerk's office, on the twenty-ninth of August, the sheriff had no authority to take any proceedings for the completion of the attachment, previously omitted; that the writ was authority to him only for acts performed while it remained in his possession; and hence, that another creditor of the debtor purchasing the property from the latter, on the sixth of September, took it free from any lien of the attachment.⁴

§ 4139. **Return, when to be Made.**—The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner.⁵

¹ Newhall v. Provost, 6 Cal. 85;
Webster v. Haworth, 8 Id. 21.

² Ritter v. Scannell, 11 Cal. 238.

³ Egery v. Buchanan, 5 Cal. 53.

⁴ Wheaton v. Neville, 19 Cal. 41.

⁵ Cal. Code C. P., sec. 559.

§ 4140. **Second Attachment.**—Where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession.¹

§ 4141. **Sale of Perishable Property.**—If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution.² No order of sale is required to authorize a sale by the officer.³

§ 4142. **Notice of Motion to Discharge Attachment.**

Form No. 1000.

[TITLE.]

To, attorney for defendant:

Please take notice that on an affidavit, of which the within is a copy [or of which a copy is annexed], and on all the papers filed and served in this action, the undersigned will move the court, at, on the day of, 18.., at o'clock in thenoon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action [if for irregularity, add, upon the grounds, among others—specifying the irregularity], and for such other or further order as may be just.

[DATE.]

[SIGNATURE.]

§ 4143. **Against Steamers, Boats, and Vessels.**—In action against steamers, vessels, and boats, after appearance in the action of the owner, the attachment may on motion be discharged in the same manner and on like terms and conditions as attachments in other cases.⁴ And the court whose mesne or final process has made the first actual seizure will have exclusive power over its distribution, and its judgments will be regarded as complete adjudications of the subject-matter of litigation.⁵

§ 4144. **Notice.**—A notice of motion to discharge a writ of attachment, “because the said writ was improperly issued,” is insufficient. The notice should specify the grounds of the motion, and wherein it will be urged that the writ was improperly issued.⁶

¹ O'Conner v. Blake, 29 Cal. 312.

² Cal. Code C. P., sec. 547.

³ Low v. Henry, 9 Cal. 551.

⁴ Cal. Code C. P., sec. 825; relative to the claim for wages, see Cal. Code C. P., sec. 823.

⁵ Averill v. Steamer Hartford, 2 Cal. 308.

⁶ Freeborn v. Glazer, 10 Cal. 337. For instances where an attachment

ought not to issue, see Griswold v. Sharpe, 2 Id. 24; Dulton v. Shelton, 3 Id. 206; Low v. Henry, 9 Id. 539; Gregory v. Higgins, 10 Id. 339; Patrick v. Montader, 13 Id. 434; Davis v. Eppinger, 18 Id. 378; Hill v. Grigsby, 32 Id. 55; Hathaway v. Davis, 33 Id. 168; Porter v. Brooks, 35 Id. 199; Cal. Code C. P., sec. 556.

§ 4145. **When Motion may be Made.**—The defendant may also, any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the writ of attachment be discharged, on the ground that the same was improperly or irregularly issued.¹ This section of the practice act, which provides that the defendant may, at any time before answering, “apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment be discharged, on the ground that the writ was improperly issued,” does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made.²

§ 4146. **May be Opposed by Affidavits.**—If the motion be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.³

§ 4147. **The Same—Where the Motion is Simply on Giving Security.**

Form No. 1001.

[TITLE.]

To, attorney for defendant:

Please take notice that the undersigned will move this court, at, on the day of, 18. . ., at o'clock in the noon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action, on giving due security.⁴

[DATE.]

[SIGNATURE.]

§ 4148. **Undertaking on Release of Attachment.**

Form No. 1002.

[TITLE.]

Whereas the above-named plaintiff commenced an action in the superior court of the state of, in and for the county of, against the above-named defendant, claiming that there was due to said plaintiff from said

¹ Cal. Code C. P., sec. 556.

² Freeborn v. Glazer, 10 Cal. 337.

³ Cal. Code C. P., sec. 557.

⁴ The above notice is under Cal. Code C. P., sec. 554. The defendant must have appeared in the action. The notice is governed, as to time, by section 1005. The applica-

tion may be to the court, or to the judge thereof, or to a county judge: Sec. 554. It may be for an entire or partial discharge of the attachment, and the order can be made only on giving the bond required by the following section: Id.

defendant the sum of dollars, besides interest, and thereupon an attachment issued against the property of the said defendant, as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant have attached and seized by the sheriff of the county of, under and by virtue of the said writ.

And whereas the said defendant has appeared in the said action, and has applied to the said court, upon reasonable notice to the said plaintiff, for an order to discharge the same upon the execution of an undertaking on behalf of the said defendant by at least two sureties, residents and freeholders or householders in the said county of, in accordance with the provisions of sections 554 and 555 of the code of civil procedure, and the said court having fixed the sum for which the undertaking shall be executed at the sum of dollars.

Now, therefore, we, the undersigned, residents and householders [or freeholders] in the said county of, in consideration of the premises, and in consideration of the release from attachment of the property attached, as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake, in the said sum of dollars, and promise that in case the said plaintiff recover judgment in the said action, the said defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the said defendant and sureties will on demand pay to the said plaintiff the full value of the property released, not exceeding the said sum of dollars.

[DATE.]

[SIGNATURES AND SEALS.]

[Justification.]

§ 4149. Bond of Indemnity, Given to Sheriff by Plaintiff.

Form No. 1003.

Know all men by these presents, that we, A. B. as principal, and C. D. and E. F. as sureties, are held and firmly bound unto G. H., sheriff of the county of, state of, in the sum of dollars, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 18..

Whereas, under and by virtue of a writ of attachment, issued out of the superior court of the state of, in and for the county of, in an action wherein the said J. K. was plaintiff and A. B. was defendant, against said defendant, directed and delivered to said G. H., sheriff of the county of, the said sheriff was commanded to attach and safely keep all the property of said defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand; amounting to dollars, as therein stated, and the said sheriff did thereupon attach the following-described goods and chattels [describe chattels].

And whereas, upon the taking of said goods and chattels by virtue of the said writ, L. M. claimed the said goods and chattels as his property, and thereupon a jury was summoned by the said sheriff to try such claim, which said jury have by their finding decided in favor of said claimant. And whereas the said plaintiff, notwithstanding such finding, requires of said sheriff that he shall retain said property under such attachment and in his custody.

Now, therefore, the condition of this obligation is such, that if the said A. B., P. Q., and R. S., their heirs, executors, and administrators, shall well and truly indemnify and save harmless the said sheriff, his heirs, executors, and administrators, of and from all damages, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his heirs, executors, or administrators, shall sustain or in any wise be put to, for or by reason of the attachment, seizing, levying, taking, or retention by the said sheriff, in his custody, under said attachment, of the said property claimed as aforesaid, then the above obligation to be void, otherwise to remain in full force and virtue.

[ATTEST, DATE, ETC.]

[SIGNATURES AND SEALS.]

[Justification, if required by sheriff.]

§ 4150. **Character of Instrument.**—An indemnity bond to the sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect.¹ If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility.²

§ 4151. **Liability of Sureties.**—Where the sheriff, under a writ of attachment in the suit of plaintiff against partners, is

¹ Davidson v. Dallas, 8 Cal. 227.

² Id.

about to levy upon the property of the firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble, and expense he may be put to by reason of the non-seizure of the property, and also "to pay whatever judgment may be rendered against said defendants," and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be a partner, it was held that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties.¹ Such bond will be presumed to have been executed with reference to the provisions of the statute; and as the security required by the statute is security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition to "pay whatever judgment may be rendered against said defendants."²

§ 4152. Undertaking on Release of Attachment to be Given to Sheriff.

Form No. 1004.

[TITLE.]

Whereas the above-named plaintiff has commenced an action in the aforesaid court against the above-named defendant for the recovery of dollars.

And whereas an attachment has been issued, directed to the sheriff of the county of, and placed in his hands for execution, whereby he is commanded to attach and safely keep all the property of the said defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand therein stated, in conformity with the complaint, at dollars, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said demand, besides costs, in which case to take such undertaking.

And whereas the said defendant is desirous of giving the undertaking mentioned in the said writ.

Now, therefore, we, the undersigned, residents of the county of, in consideration of the premises, and to prevent the levy of said attachment, do hereby jointly and sev-

¹ Heynemann v. Eder, 17 Cal. 433.

² Id.

erally undertake, in the sum of dollars, and promise to the effect that if the said plaintiff shall recover judgment in said action, we will pay to the said plaintiff, upon demand, the amount of said judgment, together with the costs, not exceeding in all the said sum of dollars.

[DATE.]

[SIGNATURES AND SEALS.]

[Justification.]

§ 4153. **Bond to be Given.**—Whenever the defendant has appeared in the action, he may, upon reasonable notice, apply for an order to discharge the attachment in whole or in part, which order may be granted upon an execution of undertaking.¹ A common-law bond in form, upon the prescribed statutory conditions, given to a sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute.² Whether each obligor is liable to the sheriff for the whole amount of any judgment against him, leaving the question of contribution to be settled between them, *quære*.³ An undertaking given to a sheriff to procure a release of goods attached is for the benefit of the plaintiff who may sue on it, and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility.⁴ The undertaking only operated to release the property from the custody of the sheriff pending the suit, and not as an actual substitution of security.⁵

§ 4154. **Penalty—Measure of Liability.**—In a bond given to release property seized on an attachment, the obligors undertook to pay, on demand, to plaintiffs in the action, the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiff might recover. In the bond the action is recited as for one thousand six hundred dollars. Upon delivery of the bond, the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the bond: it was held that recovery may be had on the bond to the extent of the penalty.⁶ Such a bond is not a statutory undertaking, but is valid as a common-law obligation, and is a sufficient compliance with the statute. The mistake in the recital, as to the amount for which attachment is issued, may be explained and corrected by parol.⁷ Execution against the judgment debtor, in such case, is not a condition precedent to suit on the bond.⁸ A bond given voluntarily to the sheriff, on delivery of the property, is valid at common law.⁹

¹ Cal. Code C. P., sec. 554.

² *Curiac v. Packard*, 29 Cal. 194.

³ *White v. Fratt*, 13 Cal. 521.

⁴ *Curiac v. Packard*, 29 Cal. 194.

⁵ *Low v. Adams*, 6 Cal. 277; *Curiac*

v. Packard, 29 Id. 194.

⁶ *Palmer v. Vance*, 13 Cal. 553.

⁷ Id.

⁸ Id.

⁹ Id.

§ 4155. **Right of Sureties.**—If the defendant obtains an order for the release of the property attached, by delivering to the court an undertaking executed by sureties, conditioned to pay the plaintiff any judgment he may recover, and the property is thereupon released, whenever the liability of the sureties is fixed by the rendition of the judgment in favor of the plaintiff, the sureties have a right to tender to the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking.¹

§ 4156. **Suit on Bond.**—Where defendant in attachment applies to the court under sections 554 and 555, California code of civil procedure, for a discharge of the attachment, and an undertaking is executed by D. and R., reciting the fact of the attachment, and that “in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned,” they undertake to pay whatever judgment plaintiff may recover, etc., and the court makes an order discharging the writ and releasing the property, it was held, in suit against the sureties on the undertaking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made.² An undertaking on attachment is an original, independent contract on the part of the sureties, and must be construed in connection with the statute which authorizes it.³ If, in an undertaking on attachment, a word is omitted by mistake, and, by looking at the whole undertaking and the statute, it is apparent what word was intended to have been inserted, the omitted word may be supplied, and the contract read as if it had been expressed, without first reforming it by supplying the omitted word.⁴

§ 4157. **Order Vacating Writ of Attachment.**

Form No. 1005.

[TITLE.]

On the annexed notice of motion [and the affidavits of L. M. and N. O.], and on motion of G. H. for defendant:

It is ordered that the attachment issued [or granted] against

¹ Hayes v. Josephi, 26 Cal. 540; Curia v. Packard, 29 Id. 194.

² McMillan v. Dana, 18 Cal. 339; but see Williamson v. Blattan, 9 Id. 500.

³ Frankel v. Stern, 44 Cal. 168.

⁴ Id.

the property of the above-named C. D., on theday of, 18..., be discharged; and that any and all proceeds of sales and moneys by said sheriff collected, and all the property attached remaining in his hands, be delivered and paid by him to the defendant or his agent, and released from the attachment.

[DATE.]

[SIGNATURE.]

§ 4158. **When Writ shall be Discharged.**—If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.¹ An order improperly dissolving an attachment will be reversed.² If the complaint states no cause of action, and does not admit of amendment, the attachment should be dissolved. If the complaint can be made good by amendment, the plaintiff should be allowed to amend, pending the motion to dissolve the attachments.³ If the defendant dies after the levy of an attachment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator.⁴ An attachment is dissolved by the death of the debtor, and the appearance of the administrator.⁵ An attachment will be dissolved if the debt for which it was procured was secured by a mortgage.⁶

§ 4159. **When Writ will not be Discharged.**—In New York an attachment issued as a provisional remedy under the code of procedure can not be dissolved as to a part of the property, merely upon giving security as to such part, under sections 240 and 241 of the code (New York). An application for a discharge upon the undertakings specified in those sections must relate to the whole of the property levied on.⁷ It is otherwise in California.⁸

§ 4160. **Judgment where Property is Attached, how Satisfied.**—If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for the purpose: 1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or

¹ Cal. Code C. P., sec. 558.² Reiss v. Brady, 2 Cal. 132.³ Hathaway v. Davis, 33 Cal. 161.⁴ Myers v. Mott, 29 Cal. 359.⁵ Pancost v. Corporation of Washington, 5 Cranch C. C. 507.⁶ Kinsey v. Wallace, 36 Cal. 463.⁷ Royal Ins. Co. v. Noble, 5 Abb. Pr., N. S., 54.⁸ California Code of Civil Procedure, sec. 554.

of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment. 2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.¹ The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it.² A lien on land acquired by an attachment can not be rendered effectual for the purpose of impeaching a conveyance of the land made by the defendant in the attachment, until judgment is obtained in the suit in which the attachment is issued.³ An attachment lien upon the property can be enforced only by a sale of the attached property under execution.⁴ Plaintiff, on January 10, 1858, in a suit against M. and others, composing the W. Co. (a corporation), but not making the corporation as such a party defendant, attached a quartz-mill and ledge belonging to the corporation. Subsequently the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9, 1858, sale October following; W. the purchaser. Defendants here are in possession under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale: it was held that he can not recover; that he acquired no lien by the attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9, 1858, under which defendants claim, the latter have the better right.⁵

§ 4161. **Distribution of Proceeds.**—In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their

¹ Cal. Code C. P., sec. 550.

⁴ Myers v. Mott, 29 Cal. 359.

² Low v. Henry, 9 Cal. 538.

⁵ Collins v. Montgomery, 16 Cal.

³ McMinn v. Whelan, 27 Cal. 300. 398.

claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims as presented, and claiming preference under this section, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of the payment thereof; and the officer shall retain the possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim.¹

§ 4162. **Judgment for Defendant.**—If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom.²

§ 4163. **Paying over Proceeds.**—The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them.³ A sheriff who receives an attachment, regular upon its face, can not pay over the money obtained by him from the sale of property levied on by virtue of the writ, to a junior attaching creditor, because the complaint in the action in which the attachment was issued did not set forth a cause of action upon which an attachment could issue.⁴

§ 4164. **Sale of Property.**—Whenever property has been taken by an officer under a writ of attachment, and it is made

¹ Cal. Code C., sec. 1206.

² Id., sec. 553.

³ Dixey v. Pollock, 8 Cal. 570.

⁴ McComb v. Reed, 28 Cal. 281.

to appear satisfactorily to the court, or a judge thereof, or a county judge, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action.¹ But no order of court is necessary to authorize a sale by the officer of perishable property.²

§ 4165. **Garnishment.**—By the United States courts it has been held that a garnishment is a suit, and not a mere process of execution, and hence jurisdiction must appear by the pleadings.³ The doctrine of garnishment, although partially regulated by statute, is not the less a common-law proceeding, and therefore in proceedings against a garnishee the parties are entitled to a jury trial.⁴ The process of garnishment is a legal, not an equitable, remedy, and only applies to cases where the legal, as distinguished from the equitable, relation of debtor and creditor exists between the defendant and the garnishee.⁵

§ 4166. **Notice, Effect of.**—A plaintiff who has sued out an attachment and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property against the garnishee.⁶ A garnishment served upon the owner, in the suit against the head contractor, after the commencement of the building, and before notice served, must prevail over the lien of a subcontractor.⁷

§ 4167. **Who and when Liable.**—All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him is

¹ California Code of Civil Procedure, sec. 548.

² Low v. Henry, 9 Cal. 538.

³ Tunstall v. Worthington, Hempst. 662.

⁴ Cahoon v. Levy, 5 Cal. 294.

⁵ Hassie v. G. I. W. U. Cong., 35 Cal. 378.

⁶ Roberts v. Landecker, 9 Cal. 262.

⁷ Cahoon v. Levy, 6 Cal. 295; but see Cal. Code C. P., sec. 1186, and Barber v. Reynolds, 44 Cal. 519.

satisfied.¹ The liability of a garnishee dates from the service of the attachment and affidavit, and not from the notice to appear.² Where B. was garnished in a suit against C., the day before he accepted an order drawn by A. in favor of C., but failed to inform B. thereof, and C., for a valuable consideration, sold the order, as indorsed, to D., an innocent purchaser, it was held that B., having made the order negotiable, and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D. for the full amount thereof.³

§ 4168. Affidavit to Examine Garnishee.

Form No. 1006.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff above named; that this action was commenced in this court by the filing of the complaint, affidavit, and undertaking on attachment, and the issuance of the summons and writ of attachment thereon, and that said attachment is still in force.

II. Deponent further says that he gave information in writing to the sheriff of said county, that one C. D. had in his possession or under his control certain credits [or other personal property] belonging to the defendant, and said sheriff, on the day of, 18.., served upon said C. D. a copy of said writ, and a notice that said credits [or other personal property] were attached in pursuance of said writ; that said C. D. thereupon replied [state reply].

III. But this deponent is informed and believes, notwithstanding said reply, that the said C. D. has in his possession or under his control credits [or other personal property] belonging to the defendant as aforesaid, and prays that the said C. D. may be required to attend before this court, and be examined on oath respecting the same.

§ 4169. Order to Examine Garnishee.

Form No. 1007.

[TITLE.]

The people of the state of California, to, greeting:

Whereas an attachment has been issued out of this court, against the property of the defendants in the above-entitled action, and is still in force; and whereas it has been alleged and made to appear that you have in your possession or under your

¹ Cal. Code C. P., sec. 544.

² Johnson v. Carry, 2 Cal. 33.

³ Garwood v. Simpson, 8 Cal. 101.

control certain debts, moneys, effects, credits, and other property owing to or belonging to said defendant:

You are therefore commanded to be and appear before me at, on the day of, 18..., at o'clock, then and there to be examined on oath concerning the same; and you are further commanded not to pay, transfer, return, or otherwise part with or dispose of any such debts, moneys, effects, credits, or other property, until duly released according to law.

Given under my hand this day of, 18...

[SIGNATURE.]

§ 4170. **Appearance of Garnishee.**—The provisions of the statute authorizing this proceeding were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee; and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step.¹ Section 545, California code of civil procedure, refers to persons owing debts due to, or having possession of, personal property belonging to the defendant in an attachment suit.² The provision found in section 545, California code of civil procedure, to the effect that the defendant may also be required to attend for the purpose of giving information respecting his property, does not look to the entry of an order directing him to surrender property in his own possession, but merely to give such information, under oath or otherwise, as will facilitate the examination of a garnishee under examination.³

§ 4171. **Answer of Garnishee.**—A garnishee has the right to interpose an answer.⁴ And courts should allow a garnishee to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided.⁵

§ 4172. **Citation to Garnishee.**—Persons owing debts to the defendant, or having in possession or under their control any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same.⁶

§ 4173. **Discharge.**—And where a party is garnished to answer on a certain day, and appears, and the summoning party

¹ Roberts v. Landecker, 9 Cal. 262.

² Ex parte Rickleton, 51 Cal. 316.

³ Id.

⁴ Shorey v. Rennell, 1 Sprague, 418.

⁵ Smith v. Brown, 5 Cal. 118.

⁶ Cal. Code C. P., sec. 545.

declines or is not prepared to take his answer, and a term elapses without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer.¹

§ 4174. **Liability—Notice to Third Person.**—A garnishee can only be required to answer as to his liability to the debtor or defendant, at the time of the service of the garnishment.² Unless the answer of a garnishee discloses liens having priority of claim upon the funds in his hands, judgment must be rendered for the amount he admits is due.³ If he certifies that he has no property, etc., the certificate may be impeached.⁴

§ 4175. **Other Actions Pending.**—A garnishee can not plead the pendency of the attachment suit in abatement of an action subsequently brought against him by the debtor in the attachment. Nor can he safely pay his creditor, the debtor in the attachment, so long as proceedings by attachment are in force. The proper course is for the court to order a suspension of the action against the garnishee by his creditor, until the attachment proceedings are disposed of.⁵ The fact that the defendant in an action for the recovery of money has been garnished by a creditor of the plaintiff constitutes no defense to the action, and can not be set up in the answer as a plea in bar. The remedy of defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of.⁶ In the suit of H. against C., A. as sheriff, under a writ of attachment regularly issued in said action, seized in the hands of S. personal property as the property of C. S. sued A. to recover said property, alleging ownership, and on the trial deraigned title through a sale to him from C., made prior to said seizure under attachment. A., in defense, pleaded said attachment suit and proceedings, and that said sale was fraudulent and void as against H. On the trial A. introduced in evidence the complaint, summons, answer, affidavit, and undertaking for attachment, and the writ of attachment in said suit of H. against C., but introduced no judgment therein or other evidence of the debt demanded in said complaint: it was held that the admission of said evidence under the objections of S. was proper, but that said attachment suit and proceeding were unavailable

¹ Ogden v. Mills, 3 Cal. 253.

² Norris v. Burgoyne, 4 Cal. 409.

Cahoon v. Levy, 4 Cal. 244. For the requisites of the sheriff's notice to third persons, of the attachment, see Kuhlman v. Orser, 5 Duer, 242; Wilson v. Duncan, 11 Abb. Pr. 3.

⁴ Hopkins v. Snow, 4 Abb. Pr. 368;

Carroll v. Finley, 26 Barb. 61.

⁵ McFadden v. O'Donnell, 18 Cal. 160.

⁶ McKeon v. McDermott, 22 Cal. 667; Pierson v. McCahill, 21 Id. 122.

to A. as a defense to said action, in the absence of proof of a judgment therein, or the existence of said debt.¹ The transfer of said property by said sale from C. to S., even if fraudulent, was good as against all the world except creditors, and even a creditor at large could not attack it.² When property is taken from the possession of the defendant by the officer levying thereon, it is sufficient to introduce in evidence the attachment or execution under which the levy is made; but when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment or prove the debt for which judgment is demanded in the attachment suit.³

§ 4176. **Proceedings against Garnishee.**—An order requiring a garnishee to pay into the court the amount for which judgment has been rendered against him may be considered as improper.⁴ In proceedings against a garnishee, it is the duty of the court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor.⁵

§ 4177. **Proceeds of Mining Claim.**—The defendant, some time previous to the suit of the plaintiff against the R. S. Mining Company, sued the company and obtained judgment against it by default. The judgment was made to draw a certain rate of interest, without there being any prayer for such relief in the complaint. It was also erroneous in certain other respects. On appeal to the supreme court the judgment was modified by striking out certain clauses, and in certain other respects. There was no stay of proceedings in the court below, and before the decision of the case by the supreme court the defendant had taken out an execution, and caused the mining claims of the R. S. Mining Company to be sold. At the sale the defendant bid the full sum for which his execution called, and became the purchaser. He paid the sheriff no money except his fees on the execution, but gave him a receipt, as is usual in such cases, for a sum equal to the face of the execution, less the fees paid to the sheriff. The R. S. Mining Company had ceased to work their mine prior to this sale. After the sale a contract was made between the defendant and the company, by which the latter agreed to work the mine during the time allowed for the redemption, and pay over the proceeds to the defendant, and the

¹ Sexey v. Adkinson, 34 Cal. 346.

² Id.

³ Id.; see also Horn v. Corvarubias, 51 Cal. 524.

⁴ Smith v. Brown, 5 Cal. 118; Brummagin v. Boucher, 6 Id. 16.

⁵ Id.

latter agreed to pay all the expenses of working, and to pay the company wages in any event, whether the mine should yield a profit or not. Under this contract the defendant received from the mine, over and above expenses, the sum of seven thousand dollars in gold-dust. Plaintiff, as an attaching creditor of the R. S. Mining Company, brings suit against the defendant as garnishee: it was held that the case presented failed to make the defendant a debtor of the company within reach of plaintiff's attachment.¹

§ 4178. **Release of Garnishee.**—Where a garnishee, in discharge of a rule, answers on oath that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the court without further delay, unless his answer is controverted by the affidavit of the plaintiff.²

§ 4179. **Trust Fund.**—Where A., who carried on a printing-office, was indebted to the hands of the office, and he placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do, and where there was no evidence showing that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B., at the suit of C. against A., it was held that the money was liable to the attachment.³

CHAPTER III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 4180. **In General.**—The statute provides the remedy of claim and delivery of personal property, which is a substitute for the former action of replevin, and is, at least, commensurate with the action of detinue at common law.⁴ The plaintiff may, at the time of issuing summons, or at any time before answer, claim the delivery of such property to him.⁵ He must claim the delivery under this section before answer, or not at all; but his failure to do so does not affect the question of ultimate relief.⁶ At common law replevin did not lie unless there had been an unlawful taking from the possession of another. Hence, for an

¹ Johnson v. Lumping, 34 Cal. 293.

² Ogden v. Mills, 3 Cal. 253.

³ Chandler v. Booth, 11 Cal. 342.

⁴ McLaughlin v. Piatti, 27 Cal. 452.

⁵ Cal. Code C. P., sec. 509; N. Y. Code, sec. 206.

⁶ Wellman v. English, 38 Cal. 583.

unlawful detention or conversion of goods deposited with a bailee, detinue or trover, and not replevin, was the proper action.¹ But the practice is regulated by the various states. In California, claim and delivery (replevin) lies where the plaintiff is owner of the property which is wrongfully detained by the defendant.² It has been held that replevin will not lie by one joint owner, but the objection can only be taken by a plea in abatement where he sues for the whole. If he sues for a moiety, the court will abate the writ.³ Neither of the tenants in common of personal property, where there is an agreement that it shall be delivered by one to the other to be sold, or shipped to a commission merchant and sold, and the proceeds equally divided, can maintain replevin against the other, nor against the vendee of the other to recover it.⁴

§ 4181. **Possession and Wrongful Taking.**—Possession by the plaintiff, and an actual wrongful taking by the defendant, are necessary to support the action of replevin.⁵ But the taking need not be by defendant; it lies against all persons in whose possession personal property, unlawfully taken, may be found, except officers of the law who have possession by virtue of legal process.⁶ The archives of any department are not in the possession of the head of department, chief of bureau, or clerk under either for the time being, but in the possession of the United States. Hence a party can not, by writ of replevin against such head of department, or other public officer, take papers from the public archives on allegation of their being his private property.⁷

§ 4182. **Measure of Damages.**—In actions of replevin, where delivery can not be had, and only detention of property is complained of, the measure of damage in respect of the value of property detained is the value at the place of detention when the action was commenced. In such case the action bears a near resemblance to trover, in which the value of the property at the place of conversion is taken as the criterion.⁸ For the purpose of determining the value of the property at the place of detention, and where also delivery should have been made, evidence is admissible of its value at the place of market, the

¹ Meany v. Head, 1 Mason, 319.

² Cal. Code C. P., sec. 510.

³ D'Wolf v. Harris, 4 Mason, 515—
a case not decided under a statute similar to the California statute; *quære*.

⁴ Hewlett v. Owens, 50 Cal. 474.

⁵ Dickson v. Mathers, Hempst. 65;
McArthur v. Hogan, Id. 286.

⁶ Murphy v. Tindall, Hempst. 10;
compare Williamson v. Ringgold, 4
Cranch C. C. 39.

⁷ Archives of Census Bureau, 6 Op.
Att'y-Gen. 7; Brent v. Hagner, 5
Cranch C. C. 71.

⁸ Hisler v. Carr, 34 Cal. 641.

cost of transportation thither, and the usual expenses of sale.¹ But where a delivery of the property can not be had, it is error to award the plaintiff interest on the value, in addition to damages in a gross sum.² In replevin, evidence may be admitted of the highest market value of the property between the time of conversion and the trial.³ In an action to recover the materials which before their removal composed a structure which was a part of the realty, the measure of damages is the value of the materials after their removal, and not the value of the structure as it stood before the removal.⁴ In a proper case the recovery of damages for detention is as much a primary object of the action as the recovery of the property in specie.⁵

§ 4183. Affidavit on Claim and Delivery of Personal Property.

Form No. 1008.

[TITLE.]

State of California, }
City and County of } ss.

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action.

II. I am the owner of, and am lawfully entitled to the possession of, the following-described personal property, to wit [describe property].

III. That the said property is in the possession of and is wrongfully detained by the defendant in the said action.

IV. That the alleged cause of the detention of the said property, according to my knowledge, information, and belief, is the following, to wit [or if he knows cause of detention from personal knowledge, allege it].

V. That neither the said property, nor any part thereof, has been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against my property [or that said property was seized and is held under an execution (or attachment) against my property, but that the same is exempt by law from such seizure, alleging exemption as in No. 1010], and that the actual value of the said property is dollars.

[JURAT.]

[SIGNATURE.]

§ 4184. Another Form.

Form No. 1009.

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

¹ Hisler v. Carr, 34 Cal. 641.

⁴ Pennybeck v. McDougal, 48 Cal.

² Freeborn v. Norcross, 49 Cal. 313. 160.

³ Tully v. Harloe, 35 Cal. 302.

⁵ Buckley v. Buckley, 12 Nev. 423.

§ 4185. CLAIM AND DELIVERY OF PERSONAL PROPERTY. 113

I. I am the owner and am entitled to the immediate possession of the following-described property.

[Or, I. The following goods were stored with me by their owner for months, which storage is worth dollars; and they have been taken from me without my consent, and without payment of said storage; or other facts, showing right to the possession, avoiding legal conclusions.]

II. The said property is wrongfully detained by C. D., at

III. The alleged cause of such detention, according to my best knowledge, information, and belief, is [state it particularly]. Or, I have no knowledge, or information, or belief of any cause alleged for such detention.

IV. The said property has not been taken for a tax, assessment, or fine, pursuant to any statute.

V. It has not been seized under any execution or attachment against my property [or if so seized, show exemption as below].

[Or, V. That it was seized under an execution, but was part of my necessary household furniture, and as such is exempt from execution under the California code of civil procedure, section 690, and I am a householder supporting a family.]

VI. The said property is worth dollars.

VII. I am the plaintiff in the above-entitled action, and said action was commenced on the day of, 18.., and no answer has been filed therein. A. B.

[JURAT.]

§ 4185. **Affidavit and its Requisites.**—The California statute prescribes as follows: Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing: 1. That the plaintiff is the owner of the property claimed [particularly describing it], or is entitled to the possession thereof; 2. That the property is wrongfully detained by the defendant; 3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief; 4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; 5. The actual value of the property.¹ For the purpose of replevying goods which have been attached, the writ of attachment, coupled with proof of

¹ Cal. Code C. P., sec. 510; N. Y. Code, sec. 207.

the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ.¹

§ 4186. Allegation of Exemption from Execution.

Form No. 1010.

I am a music teacher by occupation, and the said piano is actually used by me in giving instructions. [Or, I am a physician, and said horse and buggy is used by me in the legitimate practice of my profession, and is necessary to enable me to carry on the practice of my profession.]²

§ 4187. Facts Stated.—It is proper that an affidavit, claiming that property taken is exempt from execution, should show such exemption by stating the facts which constitute the exemption.³

§ 4188. Alleged Cause of Detention—Possession Obtained by Fraud.

Form No. 1011.

That the alleged cause of such detention, according to my best knowledge, information, and belief, is as follows: That the defendant claims to have purchased the same from me, but said pretended purchase was procured by fraud on the part of said defendant, in representing himself to be solvent and worth dollars, when in fact he was insolvent, and wholly unable to pay his debts, and well knew the fact so to be, and made such representations of his solvency to me with intent to deceive and defraud me; and relying on said representations, I parted with possession of said goods.

§ 4189. Right of Possession under Special Agreement.

Form No. 1012.

That I am lawfully entitled to the immediate possession of the property hereinafter mentioned, by virtue of an agreement between me and the above-named C. D., of which the following is a copy [here set out the agreement, or in any other manner show title, by stating facts]; and that I claim possession, as aforesaid, of the following property, to wit [describe property].

§ 4190. Averment of Right of Possession as Pledgee.

Form No. 1013.

The goods hereafter mentioned were delivered to me by the said defendant, as a security for the payment of dollars; and the said defendant, unknown to me, took away said prop-

¹ Thornburgh v. Hand, 7 Cal. 554.

² As to what property is exempt from execution and who may claim it as such, see Cal. Code C. P., sec. 690. The *status* of the claimant and facts showing that the property may be

lawfully claimed as exempt by him should be shown.

³ Spalding v. Spalding, 3 How. Pr. 297; S. C., 1 Code R. 64; see Roberts v. Willard. Id. 100.

§ 4195. CLAIM AND DELIVERY OF PERSONAL PROPERTY. 115

erty from my possession against my will, and now refuses to return the same, while the said sum of money is still due and unpaid, and the said goods and chattels are my only security therefor; and I am entitled to and claim immediate possession thereof. Said goods are described as follows [description of goods].

§ 4191. Allegation of Right of Possession as Lessee.

Form No. 1014.

That I hired the goods hereinafter mentioned, of the said defendant, for the term of months, and paid him therefor the sum of dollars; and that said time has not yet expired, and the said defendant unlawfully got possession of said goods, and now wrongfully detains them from my possession. Said goods are described as follows [description of goods].¹

§ 4192. Requisition to Take Property Indorsed on the Affidavit.

Form No. 1015.

State of California, }
City and County of } ss.

To the sheriff of the county of : You are hereby ordered and required to take from the defendant, C. D., the property within described.² E. F., Attorney for Plaintiff.

[DATE.]

§ 4193. Liability of Sheriff.—If he takes property belonging to any person other than the defendant, the sheriff will, however, be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him.³

§ 4194. Requisition to Sheriff.—The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.⁴

§ 4195. Undertaking on Claim and Delivery of Personal Property.

Form No. 1016.

[TITLE.]

Whereas it is alleged by the plaintiff in the above-entitled action that the defendant in the said action has in his possession and unjustly detains certain personal property belonging to the said plaintiff, to the said possession of which the said plaintiff is lawfully entitled, of the value of dollars.

¹ The averment of wrongful detention in the words of the statute seems to be sufficient: Hoffm. Prov. Rem. 113.

² In a justice's court the requisition

may be directed to the sheriff or any constable.

³ Rhodes v. Patterson, 3 Cal. 469.

⁴ Cal. Code C. P., sec. 511.

And whereas the said plaintiff, being desirous of having the said personal property delivered to, and by indorsement in writing upon the affidavit has required the sheriff of the county of to take the said property from the said defendant.

Now, therefore, we, the undersigned, residents^{and householders} of the said *State of Cal.* county, in consideration of the premises, and of the delivery of said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are jointly and severally bound in the sum of dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action, for the return of the said property to the said defendant if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against the said plaintiff.

[DATE.]

[SIGNATURES AND SEALS.]

[Affidavit of qualification as in No. 996.]

[Approval as in No. 1020.]¹

§ 4196. **Bond Sufficient.**—A replevin bond was made to the sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond.² When the state, or any state officer in his official capacity, or any county, city, or town is a party, no bond is required of them.³

§ 4197. **Dismissal of Action before Trial.**—Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact that before the dismissal an answer had been filed in which no return of the property was claimed.⁴ The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages.⁵

§ 4198. **Duty of Sheriff.**—Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more

¹ For a form of undertaking, see *Bowdoin v. Coleman*, 3 Abb. Pr. 431; S. C., 6 Duer, 182. In some states only one surety is required, but in California the statute requires two: Cal. Code C. P., sec. 512.

² *Turner v. Billagram*, 2 Cal. 522.

³ California Code of Civil Procedure, sec. 1058.

⁴ *Mills v. Gleason*, 21 Cal. 274.

⁵ *Id.*

sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody.¹

§ 4199. **Property Concealed.**—If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.²

§ 4200. **Property, how Kept.**—When the sheriff has taken property as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking, and his necessary expenses for keeping the same.³

§ 4201. **Return of Sheriff.**—The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.⁴

§ 4202. **Service on Defendant.**—The sheriff must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither has any known place of abode, by putting them in the nearest post-office, directed to the defendant.⁵

§ 4203. **Notice of Exception to Sufficiency of Sureties on Undertaking.**

Form No. 1017.

[TITLE.]

Sir: You will please take notice that the defendant in the above-entitled action does not accept the undertaking given on

¹ California Code of Civil Procedure, sec. 512; N. Y. Code, sec. 209.

² California Code of Civil Procedure, sec. 517; N. Y. Code, sec. 214.

³ Cal. Code C. P., sec. 518; N. Y. Code, sec. 215.

⁴ Cal. Code C. P., sec. 520; N. Y. Code, sec. 217.

⁵ Cal. Code C. P., sec. 512; N. Y. Code, sec. 209.

the part of the plaintiff in the said action, upon your taking the personal property claimed by him, but expressly excepts to the same, and to the sufficiency of the sureties thereto; and that such sureties, and each of them, are required to justify, as provided by law.

Dated this day of, 18..

A. B., Attorney for Defendant.

To, sheriff of the county of

§ 4204. **Exception by Defendant.**—The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them.¹ If the defendant excepts to the sureties, he can not reclaim the property.²

§ 4205. **Justification of Sureties.**—When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify.³

§ 4206. **Notice to Sheriff to Return the Property.**

Form No. 1018.

[TITLE.]

To, sheriff of county:

I hereby require that you return to me the personal property taken by you in this action [describe property].

E. F., Attorney for Defendant.

[DATE.]

§ 4207. **Undertaking for Return to Defendant on Claim and Delivery of Personal Property.**

Form No. 1019.

[TITLE.]

I. Whereas sheriff of the ~~city~~ and county of ~~.....~~, state of ~~.....~~, under and by virtue of an order and requirement duly made and issued in the above-entitled action, and to him directed, did, on the ... day of, 18.., take from the possession of the defendant in the said action the following-described personal property, to wit [describe property].

II. And whereas the said defendant is desirous that the said property be redelivered to by the said sheriff.

III. Now, therefore, we, the undersigned, in consideration of

¹ Cal. Code C. P., sec. 513; N. Y. Code, sec. 210.

² Id.

³ Cal. Code C. P., sec. 513; N. Y. Code, sec. 210.

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the premises, and of the said redelivery of the said property from the said sheriff to the said defendant, do undertake, promise, and acknowledge to the effect that we are jointly and severally bound unto the said sheriff, in the sum of ~~20,000~~ ^{20,000} dollars (being double the value of the said property, as stated in the affidavit of the plaintiff), for the delivery thereof to the said plaintiff if such delivery be adjudged, and for the payment to ~~Def.~~ of such sum as may for any cause be recovered against the said defendant.

Dated this 31 day of March, 1896.

[SIGNATURES AND SEALS.]

[~~Affidavit of qualification as in No. 996.~~]

§ 4208. **Return of Property.**—If the defendant does not except to the sureties, he may require the return of the property upon giving a written undertaking executed by two or more sufficient sureties. But if a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519 of the California code of civil procedure.¹

§ 4209. **Approval by Sheriff.**

Form No. 1020.

I approve the within undertaking, both as to form and to the sufficiency of the sureties thereof. G. H.,

[DATE.]

Sheriff of County.²

§ 4210. **To Whom Given.**—Section 514 of the California code of civil procedure contemplates an undertaking given to the sheriff, but it is not invalid if taken in the name of the plaintiff instead of in the name of the sheriff.³ The bond is assignable by the sheriff.⁴

§ 4211. **Liabilities of Sureties.**—In an action on a replevin bond, the defendant's liability is limited to the damages sustained by a failure to return the property.⁵ The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant.⁶ The liability of the sureties can not be more than the value of the property fixed by the judgment in the original suit.⁷ In an action against the sureties on a replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom

¹ California Code of Civil Procedure, sec. 514; N. Y. Code, sec. 211.

² This is the usual form in New York, where the sheriff must indorse his approval on the undertaking: *Burns v. Robbins*, 1 Code R. 62.

³ *Slack v. Heath*, 4 E. D. Smith, 95; S. C., 1 Abb. Pr. 331.

⁴ *Wingate v. Brooks*, 3 Cal. 112.

⁵ *Hunt v. Robinson*, 11 Cal. 262.

⁶ *Nickerson v. Chatterton*, 7 Cal. 568.

⁷ *Id.*

the bond was given.¹ It must be alleged that the defendant neither redelivered the property nor paid the value thereof, as recited in the judgment, and the judgment in the replevin suit must be in the alternative.²

§ 4212. Notice of Justification of Defendant's Sureties.

Form No. 1021.

[TITLE.]

To E. F., plaintiff's attorney:

Take notice, that the sureties in the undertaking, of which a copy is annexed [or describe the undertaking], excepted to by plaintiff, will justify before the Hon., judge of the superior court of the state of, county of, at chambers, in the court-house of the city of, on the day of, 18.., at o'clock in the noon.
G. H.,

[DATE.]

Attorney for defendant.

§ 4213. Justification of Defendant's Sureties.—The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant.³ Where the defendant gives an undertaking to reclaim the property, an affidavit by the sureties annexed is not required by law, and is unnecessary to the validity of the undertaking. It is only a precautionary measure on the part of the sheriff. The right of the defendant to the delivery of the property to him is dependent on the justification upon notice;⁴ but in California the affidavit is necessary.⁵ The qualifications of sureties must be such as are prescribed by this code in respect to bail upon an order of arrest.⁶

§ 4214. Responsibility of Sheriff.—The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.⁷

§ 4215. Notice of Motion to Set Aside Proceedings.

Form No. 1022.

[TITLE.]

To, plaintiff's attorney:

Take notice, that on [the annexed affidavit, and on the com-

¹ Nickerson v. Chatterton, 7 Cal. 568.

⁵ Cal. Code C. P., sec. 1057.

² Id.; Chambers v. Walters, 7 Id. 390.

⁶ Id., sec. 516; N. Y. Code, sec. 213.

³ Cal. Code C. P., sec. 515.

⁷ Cal. Code C. P., sec. 515; N. Y.

⁴ Grant v. Booth, 21 How. Pr. 354. Code, sec. 212.

plaint and all the proceedings in this action], the undersigned will move the court, at, on the day of, 18.., at o'clock A. M., or as soon thereafter as counsel can be heard, that the affidavit made by the plaintiff in this action, and the requisition to the sheriff of the county of, indorsed thereon, and all proceedings taken by the plaintiff or by the said sheriff, respectively, by virtue thereof, may be set aside as void [and irregular, for that, etc., specifying irregularity complained of], and that the property taken by the said sheriff under said affidavit and requisition may be restored by him to the said defendant; and for such other or further relief as may be just [and for the costs of this motion].

[DATE.]

[SIGNATURE.]¹

§ 4216. **Claim by Third Person.**—If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such right or title, and serve the same upon the sheriff, the sheriff is not bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking.² Where the property in controversy is in the hands of the plaintiff and is claimed by a third person, the latter is not obliged to intervene in the pending action, but may institute an original action of claim and delivery.³

§ 4217. **Affidavit of Claim by Third Person.**

Form No. 1023.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the sole owner in my own right, and entitled to the possession, of certain personal property taken by the sheriff of the county of, in this action, which property is described as follows [description of property].

II. That on the day of, 18.., I purchased the same from one M. N., of, and paid him dollars therefor, and I have not in any way sold or disposed of the same.

[JURAT.]

[SIGNATURE.]

§ 4218. **Affidavit.**—Such third person shall make and serve upon the sheriff an affidavit showing his title to the property

¹ This form is from Abbotts, and is the approved form according to the New York practice.

² Cal. Code C. P., sec. 519; N. Y. Code, sec. 216.

³ Buckley v. Buckley, 9 Nev. 373.

and his right to the possession. Such provisions are only applicable when the property is taken by the sheriff, in the proper discharge of his duty, from the possession of the defendant or his agent.¹

§ 4219. Notice to Sheriff to Accompany Affidavit.

Form No. 1024.

[TITLE.]

To S. H., sheriff of the county of:

Please take notice that I claim the personal property mentioned in the affidavit herewith served, and require you to deliver the same to me.

[DATE.]

[SIGNATURE.]

§ 4220. Notice to Plaintiff to Indemnify Sheriff.

Form No. 1025.

[TITLE.]

To, plaintiff's attorney:

Please take notice that claims the property taken by me in this action, and that I require the plaintiff to indemnify me, or I shall not keep the property, nor deliver it to the plaintiff.

S. T., Sheriff.

[DATE.]

§ 4221. Undertaking of Indemnity.

Form No. 1026.

[TITLE.]

Whereas the plaintiff has claimed the following property [describing it], and T. S., of, claims the same as his property.

Now, therefore, we, L. M., of, merchant, and N. O., of, banker, undertake, in the sum of dollars, to indemnify the sheriff of the county of against the claim of the said T. S., in consideration that the said property be delivered to the plaintiff.

[DATE.]

[SIGNATURES AND SEALS.]

[Affidavit of qualification as in No. 996.]

§ 4222. Action on Bond.—If in a bond to indemnify a sheriff for replevying property claimed by a person other than defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff can not maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment.² If the undertaking in an action commenced in a justice's court limits the liability of the obligors to a judgment

¹ King v. Orser, 4 Duer, 431.

² Lott v. Mitchell, 32 Cal. 23.

for a return of the property rendered by the justice, and such judgment is not recovered before the justice, no recovery can be had on the undertaking, even though judgment for the return of the property be rendered by the county court on appeal.¹ Otherwise where the undertaking is in statutory form.² Nor are the sureties liable to defendant unless he recovers judgment for a return of the property. A judgment in his favor which does not award a return will not support the action.³

§ 4223. **Lien of Attachment.**—T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking as required by section 102 of the code.⁴ The undertaking was executed by defendants R. and S. The replevin suit was decided February 5, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30, 1854. On the eighteenth of February, 1855, execution in favor of other creditors of J. coming into the hands of H. as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond. It was held that the lien of T.'s attachment continued after the replevy of the goods by M. J.⁵ The possession obtained by the plaintiff in replevin is only temporary; it does not divest the title, or discharge the lien.⁶ When the same property came into the hands of H. as sheriff, the condition of the replevin bond to return the property was fulfilled.⁷

CHAPTER IV.

INJUNCTION.

§ 4224. **Definition of.**—A writ of injunction is defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing.⁸ Section 525 of the California code of civil procedure defines an injunction to be a writ or order requiring a person to refrain from a particular act. This definition given

¹ Mitchum v. Stanton, 49 Cal. 302.

² Id.

³ Id.

⁴ Cal. Code C. P., sec. 512.

⁵ Hunt v. Robinson, 11 Cal. 262.

⁶ Id.

⁷ Id.

⁸ High on Injunctions, p. 2.

by the code, however, is intended to apply only to preliminary or interlocutory injunctions, and does not limit the power of the court to decree or order, as the final relief, or part of it, that the party shall do a particular thing, as that he execute a deed, or the like. In New York mandatory injunctions are not granted under the provisional remedies of the code.¹ But they are proper as part of the final relief.² The primary classification of injunctions may therefore be into mandatory and prohibitory. A prohibitory injunction is purely a preventive remedy; if the injury be already done, the writ can not correct the injury so inflicted; it is not a punishment for past wrongs, but a restraint against the commission of future injuries. This writ is intended to require all parties to leave things just as they were at the time of the issuance of it. It will stay waste, yet it will not change the possession of the property; it will protect a party against future injury, yet it will not settle the question of title or the rights of the parties.

§ 4225. **Duration of Writ.**—With reference to duration, injunctions are divided into preliminary or interlocutory and perpetual. The first are such as are issued upon filing the bill or complaint, or at any time before the final hearing, and which are to continue until the answer is filed, or until the further order of the court, or until the final hearing. A perpetual injunction is granted only at or after a final hearing upon the merits, and may be the sole object of the suit, or be incidental to or in aid of other relief granted by the decree.

§ 4226. **Interlocutory Injunctions.**—The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered.³ It can not be used to undo what has already been done, nor to take property out of the possession of one party and put it in the possession of the other.⁴ It will not ordinarily be granted where the parties are in dispute concerning their legal rights, until the right is established at law, unless to avoid injurious consequences which can not be repaired under any standard of compensation.⁵ Where the parties are at issue upon a question of legal right, and it is necessary to preserve their respective rights *in statu quo* until

¹ Ware v. Kelsey, 14 Abb. Pr. 105.

⁴ Id.; Farmers etc. v. Reno, 53 Pa.

² People v. Vanderbilt, 25 How. Pr. 139.

St. 224.

³ High on Injunctions, sec. 4.

⁵ Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. 183.

the issue is decided, an interlocutory injunction may be properly allowed.¹

§ 4227. **Form of Injunction.**—It is often said, in a general way, that the form of an injunction must always be in the negative; but if that be true, there can be no such thing as mandatory injunctions, or injunctions requiring the performance of an act. Such expressions are generally used in cases in which the court is asked for an injunction, requiring the defendant to do an act which can not properly be required by a court of equity, because the plaintiff has a remedy at law by the recovery of damages, if the defendant omit to do the act. In the case of *Lane v. Newdigate*, 10 Ves. 194, an injunction was asked, prohibiting certain acts, and also that defendant make certain repairs. Eldon, lord chancellor, expressed a difficulty, “whether it is according to the practice of the court to decree or order repairs to be done.” In that case, however, the difficulty was overcome by requiring the defendant to refrain from such things as were clearly within the power of the court to order, but which, in this particular case, involved the repairs as a matter of necessity, so that the prohibitory order could not well be observed without making the repairs. So in *Sanders v. Logan*, 2 Fisher’s Pat. Cas. 170, the court say: “As a remedy, it should be used only for prevention or protection.” But in that case the bill prayed for an injunction and an account; and the court held that the accounting would be improper, as the true measure of damages for the use or infringement of a patent was the value of a license, and that might be recovered at law, and that the remedy by injunction is neither necessary nor proper to enforce the payment of money.² The general rule doubtless is, that preliminary or interlocutory injunctions are prohibitory or preventive merely, and must therefore be negative in form. And it is also the general rule that such an injunction should not attempt to do indirectly that which it can not do directly.³ No particular form is requisite. It is sufficient if the writ or order gives an authentic notification of the mandate of the court or judge.⁴ The seal of the court is necessary to the writ.⁵

§ 4228. **By Whom Granted.**—Independently of the statute, injunctions could only be granted by courts of equity, or a chancellor, or a master in chancery. By statute in the different states the power is granted to certain courts of inferior jurisdic-

¹ *Harman v. Jones*, 1 Cr. & Ph. 299. *Blakemore v. Glamorgan Canal*, 1

² *Sanders v. Logan*, 2 Fisher’s Pat. Cas. 170. *Myl. & K.* 183.

³ *Akrill v. Selden*, 1 Barb. 317; ⁴ *Summers v. Farish*, 10 Cal. 353.

⁵ Cal. Code C. P., sec. 152, subd. 1.

tion, court commissioners, and the like, to grant or issue temporary injunctions, but in all such cases the power is conferred and exercised as auxiliary to a court of general jurisdiction having equity powers. The effect of such an order made by a county judge is the same as if made by the district court, and the injunction is subject to be controlled, modified, or dissolved by the district judge, the same as if issued by his order in the first instance.¹ A county judge has no power to grant an injunction in an action not triable within his county; and if he do, it is void, not voidable.² In California a writ or order of injunction may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, it may be enforced as an order of the court.³ Court commissioners have no power to grant writs or orders of injunction in California.⁴

§ 4229. **When Injunction Lies.**—The granting or dissolving an injunction rests in the sound discretion of the court, and on the justice and equity of each particular case.⁵ The plaintiff's rights, in order to be protected by injunction, must be such as can be enforced in the court to which he applies;⁶ and injunction will not be granted where the acts complained of are already accomplished.⁷ The California statute gives three instances where the writ of injunction may issue, to wit: 1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.⁸ 2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff;⁹ so in aid of an action of trespass, unless it appear that the injury will be irreparable and can not be compensated in damages, injunction will not be granted;¹⁰ but an action will lie to enjoin a threatened trespass on land, where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced.¹¹

¹ *Borland v. Thornton*, 12 Cal. 440.

² *Eddy v. Howlett*, 2 Code R. 76; *Chubbuck v. Morrison*, 6 How. Pr. 367.

³ Cal. Code C. P., sec. 525.

⁴ See Code C. P., sec. 259, subd. 1.

⁵ *Tucker v. Carpenter*, Hempst. 440; *Nelson v. Robinson*, Id. 464.

⁶ *Rogers v. Mich. So. R. R.*, 28 Barb. 541; see also *Reubens v. Joel*, 13 N. Y. 492; overruling *Mott v. Dunn*, 10

How. Pr. 225; *Merritt v. Thompson*, 3 E. D. Smith, 295; *Pomeroy v. Leonard*, 5 How. Pr. 438.

⁷ *Perkins v. Brown*, 8 How. Pr. 347, 348.

⁸ Cal. Code C. P., sec. 526, subd. 1.

⁹ Id., subd. 2.

¹⁰ *Waldron v. Marsh*, 5 Cal. 119; but see *Erpstein v. Berg*, 13 How. Pr. 92.

¹¹ *More v. Massini*, 32 Cal. 590, and authorities therein cited.

3. When it appears during the litigation that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction may be granted.¹ But a careful reference to the decisions of our courts in cases arising under each of those subdivisions will be necessary to understand fully their meaning. The decisions of the highest court of California, as well as those of many other states in the Union, have been exhaustive upon the points arising under this and similar statutes.²

§ 4230. **When Injunction will not be Granted.**—Injunctions are not granted except with great caution, and in cases where the right and necessity are clear;³ and should not be granted in a matter merely pecuniary, where the probabilities are against the plaintiff's success upon the trial of the cause.⁴ It may be advantageous to give some instances where the writ of injunction will not be granted. First, one court can not, by injunction, restrain the executions or orders of another court of equal and co-ordinate jurisdiction.⁵ This is clearly the rule in California, and until recently, would seem to have been the rule everywhere. Some of the New York courts in New York city have deviated from this apparently well-settled principle of equity practice, as injunctions are now obtained in some of those courts in most instances where an action is brought. Whether this be the fault of the courts, the litigants, or attorneys, is a question which, doubtless, might require examination. But it is certain that the hasty and inconsiderate issuance of writs of injunction in doubtful cases is dangerous alike to the business interests of the country, the legal rights of parties, and the well-settled precedents of the courts. Nor can a state court enjoin the proceedings of a United States court.⁶ Nor has any United States court jurisdiction to enjoin proceedings in a state court.⁷ The general rule established by the decisions seems to be subject to three exceptions: 1. Where the proceedings in the

¹ Cal. Code C. P., sec. 526, subd. 3; N. Y. Code, sec. 604.

² See also Cal. Civil Code, sec. 3422.

³ *Roberts v. Matthews*, 18 Abb. Pr. 199.

⁴ *Fredericks v. Mayer*, 1 Bosw. 232; *Att'y-Gen. v. The Mayor etc.*, 5 De Gex, M. & G. 52; *Richards v. N. W. Dutch Church*, 11 Abb. Pr. 35; see Cal. Civil Code, sec. 3423.

⁵ *Bevalk v. Kraemer*, 8 Cal. 66;

Uhlfelder v. Levy, 9 Id. 614; *Grant v. Quick*, 5 Sandf. 612; *Platto v. Deuster*, 22 Wis. 482; *Crowley v. Davis*, 37 Cal. 269.

⁶ *Phelan v. Smith*, 8 Cal. 520; see also *McKim v. Voorhies*, 7 Cranch, 281; *Schuyler v. Pellissier*, 3 Edw. Ch. 193; *Mead v. Merritt*, 2 Paige, 404.

⁷ *Diggs v. Wolcott*, 4 Cranch, 180.

subordinate tribunal will necessarily lead to a multiplicity of actions.¹ But not where there are only two actions for the same cause.² A bill to restrain vexatious litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits in which all the claimants to the title were parties.³ 2. Where they lead in their execution to the commission of irreparable injury to the freehold. 3. Where the claim of the adverse party is valid upon the face of the instrument, or the proceeding sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality. In such cases equity will interpose.⁴

An injunction will not be granted when there is a remedy at law. A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a court of chancery.⁵ But it must be made to appear that the legal remedy would be adequate and complete.⁶ And a preliminary suit at law is not necessary where the mischief would be irremediable.⁷ When its purpose can be as fully accomplished by any other proceeding, an injunction will not be granted.⁸ In California the rules and principles of equity practice remain unaltered, and the writ of injunction can only be issued where the case is one of equity jurisdiction.⁹ But injunction will not be refused merely because the plaintiff would, on the same showing, be entitled to an order of arrest.¹⁰ Where the question is doubtful, the burden of proof lies upon the party applying for an injunction to show that the argument, *ab inconveniente*, is in his favor.¹¹ In all such cases the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief.¹² An injunction will not be issued to protect a merely nominal interest.¹³

¹ N. Y. & N. H. R. R. Co. v. Schuyler, 8 Abb. Pr. 241; S. C., 7 Id. 69; S. C., 17 N. Y. 608; Banks v. Van Antwerp, 5 Abb. Pr. 410; Heywood v. City of Buffalo, 14 N. Y. 541.

² McHenry v. Hazard, 45 Barb. 657.

³ Knowles v. Inches, 12 Cal. 212.

⁴ Heywood v. City of Buffalo, 14 N. Y. 541.

⁵ Merrill v. Gorham, 6 Cal. 41; Leach v. Day, 27 Id. 643; Logan v. Hillegass, 16 Id. 200; De Witt v. Hays, 2 Id. 463; Rogers v. City of Cincinnati, 5 McLean, 337; held affirmatively in Woolsey v. Dodge, 6 Id. 142; also Segee v. Thomas, 3 Blatchf. 11.

⁶ Hager v. Shindler, 29 Cal. 47.

⁷ Foote v. Linck, 5 McLean, 616.

⁸ Rogers v. Mich. So. R. R., 28 Barb. 541.

⁹ Minturn v. Hays, 2 Cal. 590.

¹⁰ Merritt v. Thompson, 3 E. D. Smith, 294.

¹¹ Child v. Douglas, 5 De Gex, M. & G. 739; see Coles v. Sims, Id. 9; Bruce v. Del. etc. Canal Co., 19 Barb. 378; Grey v. O. & P. R. R. Co., 1 Grant Cas. 412.

¹² Hicks v. Michael, 15 Cal. 116.

¹³ Wetmore v. Story, 3 Abb. Pr. 281.

Nor should it be granted to restrain an injury which may be amply compensated by damages.¹ An injunction can not be allowed to prevent a consequential injury, resulting from the lawful exercise of a right.² But an injunction is the proper remedy to stay a threatened injury to right of way;³ though mere apprehension of a threatened wrong is not enough.⁴

§ 4231. **Injunction, when Granted.**—The plaintiff is entitled to an injunction at the time of issuing the summons on the complaint alone, if it makes a proper case, and is verified in the manner stated in the one hundred and thirteenth section of the practice act,⁵ and verification may be by the plaintiff, or some one in his behalf; but if he asks for an injunction at any time thereafter, he must do so upon affidavits.⁶ The injunction may be granted at any time after issuance of summons, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor.⁷ When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint in advance of the filing to the judge, and obtain the order or the allowance of the writ; and such practice is regular, and not in conflict with our statute.⁸ In such case the order does not take effect until the filing of the complaint and the undertaking required.⁹ When the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction *pendente lite* should be denied.¹⁰

¹ *Marshall v. Peters*, 12 How. Pr. 221; *Mayor of N. Y. v. Schultz*, 31 Id. 385. Nor in cases of liquidated damages: see *Willard's Eq. Jur.* 274, 278; *Hoffm. Prov. Rem.* 215; *Nessle v. Reese*, 19 Abb. Pr. 240; S. C., 29 How. Pr. 382; *Coles v. Sims*, 5 De Gex, M. & G. 9; *Nicholls v. Stretton*, 7 Beav. 42.

² *Williams v. New York Central R. R.*, 18 Barb. 247; S. C., 16 N. Y. 97.

³ *Kittle v. Pfeiffer*, 22 Cal. 485.

⁴ *Mariposa Co. v. Garrison*, 26 How. Pr. 448; *Jenny v. Crase*, 1 Cranch C. C. 443. Generally, on the subject of injunctions, see *Little v. Gould*, 2 Blatchf. 165, 184; *Linden v. Hepburn*, 3 Sandf. 608; *Tom v. Daily*, 4 Ohio, 368; *Steamboat Co. v. Livingston*, 3 Cow. 713; *Osborn v. Bank of U. S.*, 9 Wheat. 738; consult, also,

Mohawk etc. R. R. Co. v. Artcher, 6 Paige Ch. 83; *Hess v. Lupton*, 7 Ohio, 217; *Oakley v. Trustees etc.*, 6 Paige Ch. 262; *McArthur v. Kelly*, 5 Ohio, 139; 2 Johns. Ch. 463; *Morton v. Beaver*, 5 Ohio, 178; *Walker v. Mad River etc. Co.*, 8 Id. 38; *Moorhead v. Little Miami R. R. Co.*, 17 Id. 340; *Smith v. Pettingill*, 15 Vt. 82; *Jackson v. Bateman*, 9 Wend. 571; *Fredericks v. Mayer*, 1 Bosw. 232; *Fitzpatrick v. Flagg*, 5 Abb. Pr. 218; *Crocker v. Baker*, 3 Id. 182; *Perkins v. Warren*, 6 How. Pr. 341; *Spring v. Strauss*, 3 Bosw. 611; *In re Clark*, 10 How. Pr. 244.

⁵ Cal. Code C. P., sec. 527.

⁶ *Falkinburg v. Lucy*, 35 Cal. 52.

⁷ Cal. Code C. P., sec. 527.

⁸ *Heyman v. Landers*, 12 Cal. 107.

⁹ Id.

¹⁰ *Gagliardo v. Crippen*, 22 Cal. 362.

§ 4232. Injunctions before Answer—Affidavit in Support of Complaint.

Form No. 1027.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the attorney in fact of the said A. B., plaintiff in this action, for the purpose of suing for and recovering the [sum of money] mentioned in the complaint, by virtue of a power of attorney under seal, for that purpose duly executed and delivered.

II. That said A. B. is now absent from the city of, and now, as I verily believe, a resident of, in the republic of Mexico, he having left the city of, for, on or about the day of, 18..

III. I have read the complaint filed in this action, and know the contents thereof, and I have information as to all the matters stated therein [give sources of information], and from such information I believe such matters to be therein truly stated and such complaint to be true.

[JURAT.]

[SIGNATURE.]

§ 4233. Affidavit in Support of Complaint by Agent or Clerk of Defendant.

Form No. 1028.

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, says as follows:

I. I am familiar with all the material matters stated in the complaint in this action on the information and belief of the plaintiff, and have actual knowledge thereof; and from such knowledge I know that the matters of fact therein stated are true.

II. Until within a few days last past, I was in the employ of said defendant as bookkeeper, and had free access to the books of said copartnership and of said defendant, and had and have personal knowledge of the financial and other business matters of the said concern, and of said defendant.

[JURAT.]

[SIGNATURE.]

§ 4234. Complaint.—On a motion for an injunction, the plaintiff must rest on the case stated in the bill, though he may, by affidavits, state with more particularity any matters which it sets forth, and refer to collateral matters which explain or which tend to support and strengthen it; he may also in the same way contradict any statements made by the defendant in his affidavit, and either party may take and read the affidavits

of other persons.¹ No injunction can be granted on the complaint unless it is verified.²

§ 4235. **Practice.**—Where an injunction is granted on the complaint, a copy of the complaint and verification attached must be served with the injunction.³ If the court or judge deems it proper that the defendant be heard before granting the injunction, an order may be made requiring the defendant to show cause at a particular time and place why the injunction should not be granted, and the defendant may in the mean time be restrained.⁴ An injunction to suspend the general and ordinary business of a corporation can not be granted except by the court or a judge thereof, and then only upon notice, unless the people of this state are a party.⁵

§ 4236. **Undertaking on Injunction.**

Form No. 1029.

[TITLE]

Whereas the above-named plaintiff has commenced or is about to commence an action in the superior court of the state of California, in and for the county of, against the above-named defendant, and is about to apply for an injunction in said action against the said defendant, enjoining and restraining him from the commission of certain acts, as in the [affidavit] filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of dollars, and promise to the effect, that in case said injunction shall issue, the said plaintiff will pay to the said party enjoined such damages, not exceeding the sum of dollars, as such party may sustain by reason of the said injunction, if the said superior court finally decide that the said plaintiff was not entitled thereto.

[DATE.]

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

§ 4237. **Must be Given.**—An injunction order is inoperative until the undertaking required by the statute be given.⁶ But where the state, or the people of the state, or any state

¹ Crowder v. Tinker, 19 Ves. 621; Cooper v. Mattheys, 8 Law Rep. 413.

² Cal. Code C. P., sec. 527. In whose favor an injunction may issue, consult Thursby v. Mills, 1 Code Rep. 83; Edgcumbe v. Carpenter, 1 Beav. 173; Waller v. Harris, 7 Paige Ch. 173.

³ Cal. Code C. P., sec. 527. As to the undertaking, see *post*.

⁴ Cal. Code C. P., sec. 530.

⁵ Id., sec. 531. As to dissolution of injunctions granted without notice, see Id., secs. 532 and 937.

⁶ Elliott v. Osborne, 1 Cal. 396.

officer in his official capacity, or any county, city, or town is plaintiff, no undertaking is required.¹

§ 4238. **Form of Bond.**—The proper form of an injunction bond is to answer all damages which the defendant may sustain in consequence of the injunction being granted.² The statutory condition is that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.³

§ 4239. **Exceptions to Bond.**—The defendant may except to the sufficiency of the sureties within five days after the undertaking is filed. If he fails to do so, he is deemed to have waived all objections to them.⁴ When excepted to, the sureties must justify before a judge or county clerk, upon notice to defendant of not less than two nor more than five days, in the same manner as upon bail on arrest, and upon a failure to justify, at the time and place appointed, the order granting an injunction shall be dissolved.⁵

§ 4240. **Order of Injunction.**

Form No. 1030.

[TITLE.]

To.....

The plaintiff in the above-entitled cause having commenced an action in the superior court of the state of California, in and for the county of against the above-named defendant, and having prayed for an injunction against the said defendant, requiring to refrain from certain acts in said complaint and hereinafter more particularly mentioned. On reading the said complaint in said action, duly verified by the oath of, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given:

It is therefore ordered by me, the judge of said superior court, that until further order in the premises, you, the said and all your counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from [here state acts to be enjoined, as in subsequent forms].

Dated this day of, 18..

A. B., District Judge.

¹ Cal. Code C. P., sec. 1058.

² Bein v. Heath, 12 How. U. S. 168.

³ Cal. Code C. P., sec. 520.

⁴ California Code of Civil Procedure, sec. 529.

⁵ Id.

§ 4241. Writ of Injunction.

Form No. 1031.

[TITLE.]

The people of the state of California to send greeting:

The above-named plaintiff having filed complaint in our superior court of the state of, in and for the county of, against the above-named defendant, praying for an injunction against said defendant, requiring to refrain from certain acts in said complaint and hereinafter more particularly mentioned. On reading the said complaint in this action, duly verified [if affidavits are used, describe them], and it satisfactorily appearing to said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given:

We therefore, in consideration thereof, and of the particular matters in the said complaint set forth, do strictly command you, and each and every of you, that until the further order of said court, you and each of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of you or either of you do absolutely refrain from and desist from [here state acts to be enjoined].

[Tested, dated, and sealed as other writs.]

§ 4242. Order to Show Cause, and Restraining Order.

Form No. 1032.

[TITLE.]

On the complaint of the plaintiff, duly verified [and upon the affidavits of and], copies of all which are hereto attached, it is ordered that the said defendant show cause before me [or before this court] at, on the . . . day of, 18.., why an injunction should not be issued restraining him from [here state acts to be enjoined], and for such other and further relief as may be just.

And it is further ordered that said defendant, his agents and servants, be in the mean time restrained, and he the said defendant is, and each of his agents and servants are, hereby forbidden to suffer or commit any of said acts until the further order of the court.

[DATE.]

[SIGNATURE OF JUDGE.]

§ 4243. Restraining Order.—A restraining order is intended to continue only until the propriety of granting a temporary injunction can be determined.¹ Whether such order is of force

¹ Cal. Code C. P., sec. 530; Hicks v. Michael, 15 Cal. 109.

without an undertaking being filed has been questioned.¹ We think, however, that the code does not require it. The granting of such orders is purely within the discretion of the court, and doubtless an undertaking may be required as a condition of its allowance in cases where the order would necessarily cause loss or injury to the defendant if the right to an injunction did not exist. We understand, also, that it is the usual practice not to require an undertaking.

§ 4244. Injunction Order, after Order to Show Cause.

Form No. 1033.

[TITLE.]

On the return of the order to show cause, made by me in the above-entitled action, on the day of, 18.., and returnable this day at my chambers in [or before the court], after hearing A. B. for the plaintiff, and C. D. for the defendant, no sufficient cause to the contrary being shown: Ordered, that the said order to show cause be, and the same hereby is, made absolute, on the plaintiff executing and filing a written undertaking with sufficient sureties, in accordance with the statute, to the effect that he will pay to the defendant such damages, not exceeding the sum of dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto. And it is further ordered that the said defendant, and his agents and servants, be enjoined and restrained [state what from] until the further order of the court.

[DATE.]

[SIGNATURE OF JUDGE.]

§ 4245. Injunction after Answer.—An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.² But when the answer to a bill for an injunction denies all the equity of a bill, a preliminary injunction should not be granted.³

§ 4246. Notice of Motion for Injunction.

Form No. 1034.

[TITLE.]

To, defendant's attorney: Please take notice that on the complaint in this action [and the affidavits of and, copies of which are hereto attached], the undersigned will move the court, at the [court-room], at, on the

¹ See Harston's Pr., note to sec. 528; N. Y. Code, sec. 530.

² California Code of Civil Pro-

cedure, sec. 609. ³ Crandall v. Woods, 6 Cal. 449.

..... day of, 18.., at o'clock, A. M., or as soon thereafter as counsel can be heard, for an injunction to restrain the defendant, his agents and servants, from [state for what the injunction is required], and for such other or further order as may be just.

[DATE.]

[SIGNATURE.]

§ 4247. **Notice to be Given.**—Notice of an application by plaintiff for an injunction must be given for the length of time prescribed by the California code of civil procedure, section 1005, that is to say, five days before the time appointed for the hearing, if the court be held in the same district, otherwise ten days, unless the court prescribe a shorter time. If given for a shorter time, and the defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under section 532.¹ An application for an injunction should contain a description of the property sought to be protected by the decree, together with appropriate allegations of the danger or loss impending.²

§ 4248. **Statements in Motion against Violation of Covenant to Build.**

Form No. 1035.

From erecting upon [describe the land] any brewery or slaughter-house.³

§ 4249. **Joint Interest.**—Where the joint interest of the parties to a contract in its subject-matter has not commenced, the court will not, on the allegation of one party that he is injured by the acts of the others, interfere by injunction against the latter.⁴

§ 4250. **Service.**—As a general rule, an injunction restraining a party from giving his services can not be granted.⁵ But a distinguished vocalist was enjoined from singing in a certain theater in violation of her contract with the management of another.⁶

§ 4251. **Specific Breaches.**—In an action to enjoin for breach of covenant, the injunction will only be extended to breaches as to which the plaintiffs show that they require protection. General words prohibiting any act and breach of the

¹ Johnson v. Wide West M. Co., 22 Cal. 479.

² Blackburn v. Stannard, 5 Law Rep. 250.

³ For another form, see Mann v. Stephens, 15 Sim. 38 Eng. Ch. 377.

⁴ Sloo v. Law, 1 Blatchf. 512.

⁵ Fredericks v. Mayer, 13 How. Pr. 571.

⁶ Lumley v. Wagner, 1 De Gex, M. & G. 604; 13 Eng. L. & Eq. 252; overruling Kemble v. Kean, 6 Sim. 333; but see *contra*: Sanquirico v. Benedetti, 1 Barb. 315; Hamblin v. Dinneford, 2 Edw. Ch. 529; and see Fredericks v. Mayer, 13 How. Pr. 571.

covenants should not be inserted; for the court does not without necessity presume there will be a violation of the covenants.¹ Where the breaches of an agreement are numerous, and from the nature of the case the plaintiff would be able to give evidence of but few of them, he may be allowed an injunction.² Thus a covenant to stop all trains at a certain station will be enforced by injunction.³ But an injunction will not be granted to enforce or protect an illegal contract.⁴

§ 4252. Against Resuming Practice after having Sold Business.

Form No. 1036.

From practicing as an attorney or solicitor in any part of, either in his own name or the name of any other person; and from endeavoring to induce any persons who were the clients of A. & B. to cease or abstain from employing B. & C. as their attorneys or solicitors, and to cease the practice of the law in any manner in the said town of

§ 4253. Covenants of Trade.—If a party covenants that he will not carry on his trade within a certain distance, or in a certain place, within which the other party carries on the same trade, a court of equity will restrain the party from breaking the agreement so made.⁵ But this is allowed because of the utter uncertainty of any calculation of damages.⁶ So if the contract names a penalty, injunction can not be granted, but the party aggrieved must sue for the penalty, even if defendant be insolvent.⁷ Not so in England.⁸ A contract not to engage or practice in a business is violated by acting as an employee in such business, and such violation will be enjoined.⁹ Contracts in restraint of trade were regarded with great disfavor by the common law.¹⁰ But the doctrine as generally held is limited to this: that a covenant not to exercise a trade, etc., anywhere, is void, but a covenant against the same, limited to a reasonable extent of district, within which competition would be possible, is valid.¹¹ A distinction has been drawn between a trade and a profession;¹² and in this case a covenant not to practice law in

¹ Earl of Mexborough v. Bower, 7 Beav. 127.

² Niagara Falls Intern. Bridge Co. v. Great Western Railroad Co., 39 Barb. 212.

³ Lindsay v. Gt. N. R. R. Co., 19 Eng. L. & Eq. 87; S. C., 10 Hare, 664.

⁴ Bennett v. Am. Art Union, 5 Sand. 631; Mott v. United States Trust Co., 19 Barb. 568.

⁵ 2 Story's Eq. Jur., sec. 722 a;

Giles v. Hart, 5 Jur., N. S., 1381; Whittaker v. Howe, 3 Beav. 394; 1 Johns. Eng. 446.

⁶ 2 Story's Eq. Jur., sec. 722 a.

⁷ Vincent v. King, 13 How. Pr. 238.

⁸ See Giles v. Hart, 5 Jur., N. S., 1381; Nichols v. Stretton, 7 Beav. 42.

⁹ Rolfe v. Rolfe, 15 Sim. 90.

¹⁰ See 2 Pars. on Cont. 254, n.

¹¹ 2 Pars. on Cont. 254.

¹² Whittaker v. Howe, 3 Beav. 394.

Great Britain was held valid, though not without some hesitation. A covenant against violation of the law and policy of the state, for example, the Sunday law, should be peculiarly favored.¹

§ 4254. Against Carrying on Business Forbidden by Lease.

Form No. 1037.

From carrying on the hardware business, or selling hardware in the store No., street, in the city of; and from conducting therein any business other than [state what].

§ 4255. Inconsistent Reliefs—Injunction Lies.—A landlord can not demand an injunction against a breach of covenant, in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent.² In chancery, a bill for injunction in such case must waive forfeiture and penalty.³ For violation of the covenant in a lease not to use the demised premises for certain purposes, injunction lies;⁴ and so even if it is a mere matter of taste.⁵ But a covenant to carry on a particular business can not be enforced by injunction.⁶ But the tenant may be restrained from doing, or permitting anything to be done, which will prevent the premises from being used for such purposes.⁷ A covenant or agreement restricting the use of any lands or tenements, in favor of other lands, creates an easement, without regard to any priority or connection of title or estate in the two parcels or their owners.⁸

§ 4256. Against Removing Fixtures.

Form No. 1038.

From removing or causing to be removed from the premises hereinafter described any out-house, shed, building, or addition, timber, building materials, or fixtures of any kind or character. Said premises are known as, at, and described as follows [description].

§ 4257. Misuse of Premises.—A tenant will be restrained from pulling down a house leased to him and building another on its site, against the will of his landlord, without regard to the question whether such change would be an improvement or an injury to the premises.⁹ An injunction will not be granted to a

¹ Dodge v. Lambert, 2 Bosw. 578.

² Linden v. Hepburn, 3 Sandf. 668; 49 S. C., 5 How. Pr. 188.

³ Boteler v. Marmaduke, 3 Atk. 457.

⁴ Dodge v. Lambert, 2 Bosw. 570; Howard v. Ellis, 4 Sandf. 369.

⁵ Steward v. Winters, 4 Sandf. Ch. 590.

⁶ Hooper v. Broderick, 11 Sim. 49.

⁷ Hooper v. Broderick, 11 Sim.

⁸ Whatman v. Gibson, 9 Sim. 196; Schreiber v. Creed, 10 Id. 35; Mann v. Stephens, 15 Id. 377; Brouwer v. Jones, 23 Barb. 153; Gibert v. Petelar, 38 Barb. 488.

⁹ Smyth v. Carter, 18 Beav. 78.

landlord to restrain tenants from removing a house, upon the ground that the security for the rent will be impaired by the removal, even though there is an express covenant in the lease that the buildings on the land shall stand as security for the rent, unless it appears that by the removal of the building the security will be left inadequate.¹

§ 4258. **Removal of Crop.**—Where the petition set forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for injunction; it was held that the injunction could not issue, unless plaintiff averred the insolvency of defendant, or an inability to make the rent on attachment or execution.²

§ 4259. **Against Underletting.**

Form No. 1039.

For granting or making, or contracting to grant or make, any lease, under-lease, or assignment of any part of the premises [designating them] demised by E. F. to G. H., by a lease dated on the day of, 18.., and from granting or conveying the same in any manner or form, or by any means.

§ 4260. **Against Transfer of Stock by Corporation.**

Form No. 1040.

From selling or transferring or issuing other stock therefor to one "A. B." or to any other person, shares of the capital stock of the company, which is standing on the books of the said company in the name of; and the said company in like manner to be restrained from permitting or making any sale, by public auction or otherwise, of said stock, or any part thereof, or from transferring the same on the books of said company, in any manner or by any means, or at all.

§ 4261. **Corporation Suspended.**—An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or a judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of the state are a party to the proceedings.³ But this rule does not prevent a preliminary injunction from being granted against a hydraulic mining company restraining it from depositing its tailings and other mining *débris* in natural watercourses, by which such refuse material is washed down upon the land of another, although the same

¹ Perrine v. Marsden, 34 Cal. 14.

² Gregory v. Hay, 3 Cal. 334.

³ Cal. Code C. P., sec. 531; N. Y. Code, sec. 224.

is granted without notice to the corporation.¹ A court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation.²

§ 4262. **Ferry Right.**—A ferry owner prevented from obtaining a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry under an illegal license granted by the county judge, within a mile of the first-established ferry.³

§ 4263. **Foreign Corporations.**—The courts of New York will not grant injunctions to suspend the corporate franchises of a foreign corporation.⁴ Nor will they, upon motion for a preliminary injunction, decide a question involving a forfeiture of corporate rights, unless it appear from the papers that serious injury will follow the refusal.⁵ But directors may be restrained from committing fraudulent acts charged.⁶

§ 4264. **Laying out Road.**—An order of a board of supervisors, laying out a road, which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law.⁷

§ 4265. **Railroad Company.**—When a railroad company is authorized to construct a road and to take private property, upon the performance of certain conditions precedent, their entry for such purposes is a proper subject for an injunction, if the condition is not performed.⁸ An injunction has been granted to prevent a change of the gauge of a railroad.⁹

¹ Golden Gate Con. M. Co. v. Superior Court, 2 West Coast Rep. 736; Hobbs v. Amador etc. Can. Co., 4 Id. 523.

² Neall v. Hill, 16 Cal. 145; Société Francaise etc. v. The Fifteenth District Court etc., Cal. Sup. Ct., Dec. 11, 1878; consult People v. Sturtevant, 9 N. Y. 263; People v. The Mayor, 10 Abb. Pr. 144; Roberts v. The Mayor, 5 Id. 47; Applely v. The Mayor, 15 How. Pr. 428; McCafferty v. Glazier, 10 Id. 476; People v. The Mayor, 9 Abb. Pr. 254; People v. Flagg, 7 Id. 179. As to restraining the payment of dividends, see Carpenter v. N. Y.

& N. H. R. R., 5 Abb. Pr. 279; Carlisle v. S. E. R. R. Co., 1 Mac. & Gor. 689.

³ Chard v. Stone, 7 Cal. 117.

⁴ Way v. Keyport Steamboat Co., 16 Abb. Pr. 320.

⁵ People v. Harlem Bridge Co., 1 Abb. Pr., N. S., 139.

⁶ Howe v. Denel, 43 Barb. 505.

⁷ Leach v. Day, 27 Cal. 643; see also Cal. Civil Code, sec. 3423, subd. 7.

⁸ Bonaparte v. Camden & Amboy R. R. Co., Baldw. 205.

⁹ Columbus etc. R. R. Co. v. Indianapolis etc. R. R. Co., 5 McLean, 450.

§ 4266. **Stock, Sale not Enjoined.**—The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law.¹

§ 4267. **In Creditors' Suits—Against Selling and Conveying Property.**

Form No. 1041.

From selling or conveying, by deed or otherwise, the following-described property [describe it], or selling, conveying, or otherwise transferring or encumbering any real or personal property held by you in trust, or otherwise acquired, received, or obtained from, by, or through [state how, or through whom, showing trust property or otherwise].

§ 4268. **Collecting Money.**—Under the ordinary injunction in a creditor's suit, it is a contempt to collect money earned before service of the injunction, and apply it to debts contracted for family supplies.²

§ 4269. **Execution.**—A court of equity will take jurisdiction of a bill for an injunction, filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted.³ It would be requiring the creditors to do a vain act to compel them to await their judgment at law and a return of execution, when it is admitted that the only effect would be a return of *nulla bona*, and the property attached would in the mean time have passed to innocent purchasers on execution sale under the judgment.⁴

§ 4270. **Executors and Administrators.**—An injunction may be granted at the instance of parties claiming to be preferred creditors of an estate, to prevent an executor or administrator from making distribution of assets, or removing them beyond the jurisdiction of the court.⁵

§ 4271. **May Proceed to Judgment.**—It seems that the debtor would not be prevented by it from proceeding to judgment, in a suit commenced before the injunction.⁶ Nor is his act, in suing for a trespass, of itself a breach of the injunction.⁷

¹ Sullivan v. Triunfo G. & S. M. Co., 29 Cal. 585.

² Taggard v. Talcott, 2 Edw. Ch. 628.

³ Heyneman v. Dannenberg, 6 Cal. 376.

⁴ Id.

⁵ Green v. Hanberry, 2 Brock. Marsh. 403; compare Wilson v. Barstable, 1 Cranch C. C. 394.

⁶ Parker v. Wakeman, 10 Paige Ch. 485.

⁷ Hudson v. Plets, 11 Paige Ch. 180.

§ 4272. **Novation.**—Merely carrying into effect, by procuring novation, a previous assignment of a right of action, is not a breach of the injunction in a creditor's suit.¹

§ 4273. **Against Transferring Assets.**

Form No. 1042.

From selling, assigning, transferring, pledging, or otherwise disposing of any of his property, except what is by law exempt from execution; or from in any manner interfering therewith until the further order of the court.

§ 4274. **Fraudulent Disposition of Property.**—An injunction may be granted restraining fraudulent disposition of property.² But an injunction granted for this purpose can not restrain the defendant from disposing of his property in a proper manner, but only from doing so with intent to defraud his creditors.³ And an injunction was modified⁴ by inserting the words "with intent to defraud," etc., but *quære*, whether this is not, as far as movables are concerned, a mere *brutum fulmen*.⁵ An offer to sell goods is not a violation of an injunction against the sale or parting with the control of them, but it may be good cause for appointing a receiver.⁶

§ 4275. **Against Transferring Negotiable Paper.**

Form No. 1043.

From indorsing, assigning, or in any way transferring [describe note or bill] a promissory note drawn by A. B. in favor of the above-named C. D. for dollars in gold coin, bearing date the day of, 18..., and payable months after said date, and accepted by the said C. D.

§ 4276. **Negotiable Securities.**—If an action for an equitable set-off is maintainable, an injunction lies to prevent one party who holds a negotiable note from disposing of it.⁷

§ 4277. **To Restrain Proceedings at Law—On Contract.**

Form No. 1044.

To restrain the defendant from proceeding further in his action at law against the above-named, upon the bond

¹ Richardson v. Rust, 9 Paige Ch. 243; to similar effect is Ireland v. Smith, 3 How. Pr. 244.

² Reubens v. Joel, 13 N. Y. 488; Malcom v. Miller, 6 Id. 456; Pomeroy v. Hindmarsh, 5 Id. 438; Dickinson v. Benham, 10 Abb. Pr. 391.

³ Brewster v. Hodges, 1 Duer, 610.

⁴ See 25 Barb. 408.

⁵ As to transfer of property generally, see Reubens v. Joel, 13 N. Y. 488, 492; overruling Mott v. Dunn, 10 How. Pr. 225; see Moran v. Dawes, Hopk. 365. Of specific per-

sonal property: Erpstein v. Berg, 13 How. Pr. 92; Furniss v. Brown, 8 Id. 63; but see 28 Barb. 542. As to transfer of stock: People v. Parker Vein Co., 10 How. Pr. 187.

⁶ Tyler v. Poppe, 4 Edw. Ch. 430.

⁷ Schieffelin v. Hawkins, 1 Daly, 289; Osborne v. Bank of United States, 9 Wheat. 738. As to the transfer of bonds, notes, etc., see State of Illinois v. Delafield, 8 Paige Ch. 527; 2 Hill, 177; approved in Farmers' etc. Bank v. Butchers' etc. Bank, 16 N. Y. 137.

of the said A. B., dated the day of, 18..., and from instituting or proceeding in any new or other action at law upon such bond; and from commencing any action or actions against the plaintiff for the recovery of [designating the alleged debt].

§ 4278. **Against Bringing Suit.**—An order of injunction, whereby the bringing of an action is restrained, will be reversed, notwithstanding an injunction bond has been given.¹ The prosecution of a suit at law against the heirs is not a violation of an injunction restraining the creditor from bringing suit against the executors for the debt.² The common order for an injunction in an interpleading suit is irregular, if it does not make the issuing of the injunction dependent on the payment of the money into court.³ When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition is no part of the time limited for the commencement of the action.⁴

§ 4279. **Enjoining Counsel.**—In an action brought to restrain proceedings at law, it is improper to enjoin the counsel employed in those proceedings, unless something more is alleged against him than the prosecution of his client's rights.⁵

§ 4280. **When Injunction Lies.**—An injunction operates to restrain not only the party enjoined, but other courts on the ground of judicial comity.⁶ An injunction can not be granted affecting the rights and interests of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued.⁷ Injunction should never be permitted to issue when it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing, and harassing suitors at law in the prosecution of their claims.⁸ Fraud and collusion in procuring the circuit court to exercise jurisdiction of an action is good ground for granting an injunction to restrain its prosecution.⁹ Proceedings will not be re-

¹ King v. Hall, 5 Cal. 82.

² Dale v. Roosevelt, 1 Paige, 35.

³ Pauli v. Von Melle, 8 Sim. 327. Particular cases in which injunctions to restrain the prosecution of actions have been granted or refused: Nixdorff v. Smith, 16 Pet. 132; Gaines v. Nicholson, 9 How. U. S. 356; Towne v. Smith, 1 Woodb. & M. 115; Fremont v. Merced Mining Co., 1 McAll. 267; see Cal. Civil Code, sec. 3423, subd. 1.

⁴ Cal. Code C. P., sec. 356.

⁵ Lord Wellesley v. Earl of Mornington, 11 Beav. 180; Davis v. Mayor of New York, 1 Duer, 451.

⁶ Engels v. Lubeck, 4 Cal. 31.

⁷ Patterson v. Yuba County, 12 Cal. 105.

⁸ Truly v. Wanzer, 5 How. U. S. 141.

⁹ Sawyer v. Gill, 3 Woodb. & M. 97; Van Vleeck v. Clark, 38 Barb. 316; 24 How. Pr. 190.

strained in any state court having jurisdiction in law and equity so that full justice can be done therein.¹ One district court has no jurisdiction to enjoin a judgment rendered in another district court. The fact that the judge of the court where the judgment sought to be enjoined was rendered is disqualified from sitting in the case does not constitute an exception to the rule.²

§ 4281. **Against Entering Confession of Judgment.**

Form No. 1045.

From entering up judgment on a warrant of attorney [or statement of confession], executed by the plaintiff to the defendant [or otherwise naming the parties], and dated on or about the day of, 18.., and from commencing any proceedings thereon.

§ 4282. **Adequate Remedy at Law.**—A court of equity will not enjoin the execution of a judgment at law, upon grounds of which the party might have availed himself to defeat the action at law.³ Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed.⁴ An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where if the neglect were excusable full relief might have been had on motion in the original action.⁵ Where a party failed to obtain the proper certificate of the referee, relying on the verbal assurance of the attorney on the other side that he would agree to a statement, such party can not be considered free from fault and negligence, and he is not in a position to invoke the aid of a court of equity to enjoin a judgment obtained against him.⁶

§ 4283. **Attachment Creditors.**—A prior attaching creditor, whose attachment has been levied on the personal property of the defendant, can not after the recovery of a judgment be enjoined from selling the property attached, under execution, at the suit of a junior attaching creditor, unless, for a

¹ 6 Sandf. 612; *Bennett v. Leroy*, 5 Abb. Pr. 156; S. C., 14 How. Pr. 178; but see 25 Barb. 531; *Conover v. The Mayor*, 5 Abb. Pr. 410; generally, *Tarrant v. Quackenboss*, 10 How. Pr. 244; *Chappell v. Potter*, 11 Id. 366; *Van Wageningen v. La Farge*, 13 Id. 16; *Mott v. U. S. Trust Co.*, 19 Barb. 569.

² *Flaherty v. Kelly*, 51 Cal. 145.

³ *Truly v. Wanzer*, 5 How. U. S. 141.

⁴ *Hungerford v. Sigerson*, 20 How. U. S. 156.

⁵ *Borland v. Thornton*, 12 Cal. 440.

⁶ *Phelps v. Peabody*, 7 Cal. 50.

sufficient consideration, he has bound himself to the junior attaching creditor not to do so but to pursue some other course, to depart from which would result in irreparable mischief to the plaintiff.¹

§ 4284. **Execution, Sale under.**—An injunction may be granted against levying an execution upon particular articles not properly subject to it, although it may not be proper to enjoin all proceedings on the execution.² Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree as when they have been misled by a mistake of fact as to the condition of the property or estate sold, provided application be made to them in suits in which such decrees are entered within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others.³ The nature and extent of the relief in such cases are matter resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rule as to mistake of law should apply, and from such, courts of equity seldom relieve.⁴ A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband.⁵

§ 4285. **Execution and Judgment Void.**—If a judgment upon which an execution issues and the execution itself are void upon their face, an injunction will not be granted to restrain a sale of property levied on under the execution, or the issuing of

¹ *Domec v. Stearns*, 30 Cal. 114. As to necessity of a special clause restraining confession of judgment, etc., compare *McCredie v. Senior*, 4 Paige, 378; *Ross v. Clusman*, 3 Sandf. 676; *Fenner v. Sanborn*, 37 Barb. 610.

² *Sawyer v. Gill*, 3 Woodb. & M. 97. Particular cases where injunctions against proceedings on execution have been granted or refused:

Amis v. Myers, 16 How. U. S. 492; *Downer v. Brackett*, 21 Vt. 599; *Prout v. Gibson*, 1 Cranch C. C. 389; *Baker v. Glover*, 2 Id. 682.

³ *Goodenow v. Ewer*, 16 Cal. 470.

⁴ Id.

⁵ *Alverson v. Jones and Bogardus*, 10 Cal. 9; see also *Englund v. Lewis*, 25 Id. 337; *Ford v. Rigby*, 10 Id. 449; and *Pixley v. Huggins*, 15 Id. 127.

any other execution on the judgment.¹ A complaint to enjoin the sale of property under an execution, and the issuance of another execution on the judgment, is devoid of equity, which only avers that the judgment and execution are void on their face, and the insolvency of one of the defendants.² The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.

§ 4286. **Injury Irreparable.**—Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title, and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners: it was held that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency.³

§ 4287. **Judgments, when Enjoined.**—All proceedings to enjoin judgments must issue from the court having the control of such judgment.⁴ To authorize the interposition of a court of chancery to enjoin a judgment at law, on the ground of newly discovered facts, the proceedings must be taken by the defendant in the judgment at law.⁵ Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence.⁶ They will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. Any fact which clearly proves it to be against conscience to execute a judgment at law, and of which a party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with fault or negligence in himself or his agents, will authorize a court of equity to restrain the adverse party by injunction from availing himself of the judgment obtained at law.⁷ Where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the proper court of law, courts of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious.⁸ If a party enters judg-

¹ Sanchez v. Carriaga, 31 Cal. 170.

⁶ Pico v. Sunol, 6 Cal. 294.

² Id.

⁷ Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Truly v. Wanzer, 5 How. U. S. 141.

³ More v. Ord, 15 Cal. 206.

⁴ Gorham v. Toomey, 9 Cal. 77; see Flaherty v. Kelly, 51 Id. 145.

⁸ Phelps v. Peabody, 7 Cal. 50.

⁵ Mulford v. Cohn, 18 Cal. 42.

ment for too much, or before the whole amount is due, it is not conclusive but only *prima facie* evidence of fraud to avoid the judgment.¹ Proceedings upon a judgment may be enjoined as to a part, and allowed to proceed as to the residue.² A bill to enjoin proceedings upon a judgment at law is not in general considered an original bill.³ If, however, new parties are introduced, and different interests involved, it will be regarded as being to that extent an original bill.⁴

§ 4288. **Mortgage Lien.**—Plaintiff has a deed of property from H. and P. Subsequently N., execution creditor of H. and P., causes the sheriff to levy on the property. Plaintiff files his bill to restrain the sale, as casting a cloud on his title. The court below found plaintiff's deed to be in effect a mortgage: it was held that the bill must be dismissed; that the purchaser at the sheriff's sale would only acquire the interest of the judgment debtors H. and P.; that plaintiff's rights, as mortgagee, would be unaffected by the sale, and hence there is no necessity for equity to interfere in his behalf.⁵ Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises, under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple v. Pender, and has not yet got a sheriff's deed: it was held that an injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff can not complain, his rights not being affected by the proceedings, as he was not a party.⁶

§ 4289. **New Trial.**—Where a party moves for a new trial and fails, he can not on the same facts go into equity to enjoin

¹ Patrick v. Montader, 13 Cal. 442; overruling Taaffe v. Josephson, 7 Cal. 356.

² Dunlap v. Stetson, 4 Mason, 349. Particular cases in which proceedings on judgments have been restrained: Swan v. Bank of United States, 2

Brock. Marsh. 293; Greenleaf v. Maher, 2 Wash. C. C. 393.

³ Simms v. Guthrie, 9 Cranch, 19, 25; Dunn v. Clarke, 8 Pet. 1; Williams v. Byrne, Hempst. 472. ⁴Id.

⁵ Purdy v. Irwin, 18 Cal. 350.

⁶ Macovich v. Wemple, 16 Cal. 104.

the judgment rendered;¹ nor in any case where the remedy by motion in the other court is ample;² or the facts were known and might have been interposed as a defense.³

§ 4290. **Purchase Money of Land.**—An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title so long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession.⁴ A bill in chancery filed by the purchaser of land against his vendor to restrain the collection of purchase money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, can not be sustained.⁵ Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.⁶

§ 4291. **Vendor's Lien.**—A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third person, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee: it was held that this judgment of the court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action.⁷

§ 4292. **Void Judgment by Default.**—If a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint,

¹ Collins v. Butler, 14 Cal. 223.

² Imlay v. Carpentier, 14 Cal. 173; Aldrich v. Stephens, 49 Id. 676.

³ Beaudry v. Felch, 47 Cal. 183. As to what a bill or complaint for new trial must show, see Mulford v. Cohn, 18 Id. 46; French v. Garner, 7 Port.

552; Duncan v. Lyon, 3 Johns. Ch. 351.

⁴ Jackson v. Norton, 6 Cal. 187.

⁵ Patton v. Taylor, 7 How. U. S. 132.

⁶ Id.

⁷ Allen v. Phelps, 4 Cal. 256.

or because of irregularities of the clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie.¹ If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense of the same.²

§ 4293. **When Injunction will not Lie.**—An injunction will not be granted to perpetually enjoin the collection of a judgment upon the ground of fraud, where the judgment was upon default, and granted more relief than the plaintiff was entitled to take from the action. The remedy is by appeal, and if void upon its face, the remedy is by motion in the court in which it is rendered.³ Where in suit before a justice of the peace, defendant answers disputing plaintiff's claim, and afterwards, on a day set for trial—plaintiff being present, but defendant absent, and no one appearing for him—the justice renders judgment for plaintiff, without evidence, and “by default,” as the docket reads, it was held that if the justice erred in his judgment, either upon the merits or as to form, the remedy is by appeal, and that such error can not be corrected by bill in equity to set aside the judgment and enjoin execution and sale thereon.⁴

§ 4294. **Against Proceedings at Law—Ejectment.**

Form No. 1046.

To restrain the defendant from proceeding further against the plaintiff, in this action commenced against him in the superior court of the state of for the county of, for the recovery of the possession of [describe the premises], and also from instituting any action or proceeding in any new or other action at law for the recovery of the possession of said premises, or any part thereof, either in said court or in any other court.

§ 4295. **Equitable Matter.**—An injunction to stay an ejectment suit until matter of equity can be examined will not be allowed, except upon condition that judgment in the ejectment be entered.⁵ Where a right to real estate has been satisfactorily established at law, a court of equity will interfere by

¹ Logan v. Hillegass, 16 Cal. 200; Gregory v. Ford, 14 Id. 141; Gibbons v. Scott, 15 Id. 286; Chipman v. Bowman, 14 Id. 157.

² Id.

³ Murdock v. De Vries, 37 Cal. 527.

⁴ Hunter v. Hoole, 17 Cal. 418; Comstock v. Clemens, 19 Id. 77.

⁵ Turner v. American Baptist Missionary Union, 5 McLean, 344.

injunction to prevent further litigation, without inquiring particularly what number of trials in ejectment have been had.¹

§ 4296. **Grain Crop as Realty.**—In an action for the possession of land on which was standing a crop of unharvested grain, and to set aside a conveyance on the ground of fraud, it was held, first, that the grain crop was part of the land, and plaintiffs were entitled thereto if entitled to recover the land; and, second, that an order made by the court *pendente lite*, restraining defendants from alienating or encumbering the land during the litigation, and appointing a receiver to take possession, harvest, and preserve the grain crop, was properly made.²

§ 4297. **Introduction of Evidence.**—Defendants, claiming title under a Mexican grant, and a patent issued upon its confirmation by the United States, bring ejectment against plaintiffs for certain premises in their occupation; plaintiffs, claiming as United States pre-emptioners, then file their bill in the same court to enjoin defendants from introducing in evidence or using the survey, plat, or patent, on the trial of the ejectment, until the determination of an action averred to be pending in the United States circuit court, by the United States against defendants and others claiming with them, to annul the survey, plat, and patent, on the ground of fraud in the survey, and in procuring the patent, the bill also averring such fraud: it was held that injunction does not lie; that the patent, until set aside, is conclusive evidence of the validity of the grant, of its recognition and confirmation, and also of the regularity of the survey, and of its conformity with the decree of confirmation; and that defendants, claiming to be pre-emptioners upon land of the United States, have no standing in court to resist the patent.³

§ 4298. **Restraining Execution.**—After judgment for the plaintiff in ejectment, brought for non-payment of rent, the defendant can not show, in a bill of equity brought to restrain the execution of the judgment, that the rent ought, under the stipulations of the lease, to have been reduced in amount.⁴

§ 4299. **Title Acquired Pendente Lite.**—Relief will be granted by way of injunction in equity, where the tenant has, pending the suit, acquired a title paramount to that of the demandant, if he can not avail himself of it as a defense to the original suit at law, or can not after recovery maintain an action to regain possession.⁵

¹ *Craft v. Lathrop*, 2 Wall. jun. C. C. 103.

² *Corcoran v. Doll*, 35 Cal. 476.

³ *Ely v. Frisbie*, 17 Cal. 250.

⁴ *Sheets v. Selden*, 7 Wall. 416.

⁵ *Bright v. Boyd*, 1 Story C. C. 478.

§ 4300. **Who may Enjoin.**—A stranger to the title of real property, though in possession, can not go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor.¹ The fact that suit in ejectment has been commenced against the judgment debtor by the real owner does not entitle him to enjoin the judgment. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the land to his grantor. Neither does the allegation that the purchaser (plaintiff in equity) has put valuable improvements on the land, and that he has paid a portion of the purchase money, and that his grantor and judgment creditor is insolvent and without visible property, take the case out of the rule. One who is the owner of land, and in possession of the same, is not entitled to an injunction to restrain a sheriff from executing a writ of restitution, issued on a judgment, rendered against third parties, to which judgment the plaintiff is a stranger.²

§ 4301. **Nuisances—against Building a Railroad on Plaintiff's Land.**

Form No. 1047.

From entering upon any part of the lands hereinafter described, for the purpose of constructing a railroad thereon, or from laying down a railroad track thereon, or from maintaining a railroad thereon, or running cars across, over, or upon the said land. The said premises are known as, and bounded and described as follows [description].

§ 4302. **Condemnation of Land.**—Where the statute under which the proceedings for the condemnation of land for road purposes is taken is unconstitutional, or its provisions are not strictly pursued, or notice is not given to the owner of the land, or the compensation is not tendered to him, a perpetual injunction against opening the road will be granted.³ A perpetual injunction against opening a road, under proceedings which have been taken, does not prevent laying out a road at any future time over the same land, whenever the proper steps are taken to acquire the right of way, and the right has been secured.⁴ Where the land was a public highway subject to the

¹ Treadwell v. Payne, 15 Cal. 496.

³ Curran v. Shattuck, 24 Cal. 431.

² Tevis v. Ellis, 25 Cal. 516; Tomlinson v. Rubio, 16 Id. 202, disapproved.

⁴ Id. As to trespasses by a railroad, see Williams v. N. Y. C. R. R., 16 N. Y. 111; reversing S. C., 18 Barb. 222.

public use, though the fee was in the plaintiff, and plaintiff had never received compensation for the use of the land by a railroad which was laid thereon, though it appeared that the railroad company was induced to construct its railroad upon said avenue by the express consent and license of the plaintiff, it was held that plaintiff was not entitled to an injunction to restrain the company from running its cars.¹

§ 4303. **Against Laying a Railroad in the Streets of a City.**

Form No. 1048.

From entering into or upon Montgomery street, in said city, for the purpose of laying or establishing a railroad therein, and from digging up or subverting the soil, or doing any other act in said street tending to obstruct or encumber it, or to prevent the free and common use thereof, as the same have been heretofore enjoyed, and from laying down any ties or railroad iron therein.

§ 4304. **Extension of Railroad Track.**—An injunction lies at the suit of the people to restrain a railroad company from laying an extension of their track in the streets of the city without authority of law.² Or to lay a railroad track in a peculiar case.³ But not after the legislature has granted right to lay the track.⁴

§ 4305. **Public Nuisances.**—Public nuisance may be enjoined if it subjects a party to special injury.⁵ An individual may have an injunction to prevent a public nuisance, when such nuisances created will be an extraordinary injury, irreparable in damages, or irremediable at law, or produce a multitude of suits.⁶ Or the same may be restrained on application of the attorney general.⁷ Where a bill is filed by the people, on the relation of the attorney general, to enjoin the state treasurer from paying money out of the treasury, on the ground of the unconstitutionality of the act directing the treasurer to make

¹ *Murdock v. Prospect Park etc. R. R. Co.*, 10 Hun, 598.

² *People v. Third Avenue R. R. Co.*, 45 Barb. 63; S. C., 30 How. Pr. 121.

³ *Dry Dock R. R. Co. v. N. Y. and Harlem R. R. Co.*, 30 How. Pr. 39.

⁴ *Sixth Avenue R. R. Co. v. Kerr*, 45 Barb. 138; affirmed, S. C., 28 How. Pr. 382. As to the discontinuance of a portion of a railroad track, see *People v. Albany & Vt. R. R. Co.*, 11 Abb. Pr. 156. As to the nuisance of lands appropriated for a railroad:

Bostock v. N. S. Railway, 3 Sm. & Giff. 283.

⁵ *Milhau v. Sharp*, 27 N. Y. 611; S. C., 17 Barb. 435; S. C., 9 How. Pr. 102; S. C., 28 Barb. 228; S. C., 7 Abb. Pr. 220; *Woodruff v. North Bloomfield etc. Min. Co.*, 1 West Coast Rep. 133.

⁶ *Parrish v. Stephens*, 1 Or. 73.

⁷ *Davis v. Mayor of N. Y.*, 2 Duer, 663; 14 N. Y. 506; *Mechling v. Kittinging Bridge Co.*, 1 Grant's Cases, 419; *People v. Gold Run etc. Min. Co.*, 4 West Coast Rep. 511.

the payment, and the court, on the final trial, deny the injunction, the judgment denying the injunction shall not contain a clause adjudging and decreeing that the treasurer pay over the money as required by the law.¹ Injunction lies at the suit of an abutting house-owner to enjoin a street-railroad company from leaving snow, which it removes from its tracks, heaped up between them and plaintiff's premises for a longer period than is reasonably necessary to remove it.² Where a plaintiff has proved his right to an injunction against a nuisance, it is not for the court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the nuisance is physically impossible. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time.³ Nothing can be restrained as a nuisance which the legislature has authorized.⁴

§ 4306. **Railroad, when a Nuisance.**—A railroad may be a nuisance if constructed in a crowded highway.⁵ The establishment and running of a horse-railroad in a public street imposes an additional burden on the land, and may be enjoined at the suit of an adjoining proprietor who owns to the middle of the street—that is, if the railroad company have not a right to do so.⁶ But where the fee of the streets is in the city where they are located, and the city has full power to control and regulate their use, a court of equity will not, at the suit of an individual, enjoin a railway company from operating its road laid in the street without permission of the city, but will leave the redress to the city authorities.⁷

§ 4307. **Steam-engine.**—An injunction may be issued to

¹ *People v. Pacheco*, 27 Cal. 227.

² *Prime v. Twenty-third Street R. Co.*, 1 Abb. N. C. 63.

³ *Attorney General v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch., 146. As to injunctions for nuisances generally, see *McCord v. Iker*, 12 Ohio, 387; *Spooner v. McConnell*, 1 McLean, 337; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189; *Bemis v. Upham*, 13 Pick. 169; *Bardwell v. Ames*, 22 Id. 333; 6 Johns. Ch. 439; *Prescott v. White*, 21 Pick. 344; *Att'y General v. Lea's Heirs*, 3 Ired. Eq. 301; *Davis v. The Mayor etc.*, 14 N. Y. 526; *Penniman v. N. Y. Balance Co.*, 13 How. Pr. 42; see also *Wier's Appeal*, 74 Pa. St. 230; and *Oglesby Coal Co. v.*

Pasco, 79 Ill. 164. Several persons may join in the prayer for injunction: 3 Sandf. 129, n.; *Murray v. Hay*, 1 Barb. Ch. 59; *Reid v. Gifford*, Hopk. 419. Held otherwise in England: *Hudson v. Maddison*, 12 Sim. 416.

⁴ *Davis v. The Mayor etc.*, 14 N. Y. 506; S. C., 2 Duer, 663; but see *Phoenix v. Comm'rs of Immigration*, 1 Abb. Pr. 473, 474.

⁵ *Davis v. The Mayor*, 14 N. Y. 524; but see Id. 531; *Hentz v. L. I. R. R. Co.*, 13 Barb. 656; *Drake v. Hudson R. R. Co.*, 7 Id. 548, 556.

⁶ *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404.

⁷ *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 588.

restrain defendant from running his steam-engine so close to plaintiff's premises as to jar his house.¹

§ 4308. **The Same—Another Form.**

Form No. 1049.

That an injunction order may be issued by this court, directed to the said defendants and each of them, their agents, servants, and attorneys, restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, or any other person or persons whomsoever, from laying a double or any track for a railway in Battery street, from Jackson to Bush streets, in the city and county of San Francisco, or any railway whatever in said Battery street, or of breaking or removing the pavement, or in any other manner obstructing the said street, preparatory to or for the purpose of laying or establishing any railway therein, or from maintaining or running or operating a railroad therein.²

§ 4309. **Appropriation of a Public Street.** — Where plaintiff seeks an injunction to restrain the appropriation of a public street, on the ground of a special injury to him by preventing access to his adjoining lot, he should specify this grievance in his complaint; a general charge that the work will be specially injurious to him is not sufficient. But if no motion is made to require the plaintiff to reform his complaint in that respect, and no objection is made upon the trial to the introduction of evidence tending to show such injury, the objection will be considered as waived.³ The breaking up of the street of a town for the purpose of laying gas-pipes, without lawful authority, is not such a nuisance as will be enjoined in equity, on an information at the relation of a rival gas company.⁴

§ 4310. **Against Continuance of Slaughter-house.**

Form No. 1050.

From using or occupying a building erected by the defendant C. D., on the east side of Harris street, between Townsend and Brannan, in the city of San Francisco, as a slaughter-house, and from slaughtering any animals or from dressing any slaughtered animals in such building, and from permitting the building to be used as a slaughter-house by others.

§ 4311. **Burning Brick.**

Form No. 1051.

From burning or manufacturing, or causing to be burned or

¹ *McKeon v. Lee*, 28 How. Pr. 238.

² For another form, see *People v. Sturtevant*, 9 N. Y. 263.

³ *Wetmore v. Story*, 22 Barb. 414; S. C., 3 Abb. Pr. 262.

⁴ *Attorney General v. Cambridge Consumers' Gas Co.*, L. R., 4 Ch. 71.

manufactured, bricks on a certain piece of land or premises in the defendant's possession [describe premises], situate in the town of, in the county of, and whereon is erected a brick-kiln, or from permitting or causing bricks to be burned or manufactured thereon.

§ 4312. Against Erecting and to Compel Removal of Buildings.

Form No. 1052.

From continuing the erection of a certain projected building on the garden, grounds, or plat of ground, described as follows [description], or any part thereof; and also from permitting or allowing such part of said building as has already been erected on said described garden or plat of ground from remaining thereon.

§ 4313. Against the Diversion of Water.

Form No. 1053.

From diverting the waters, or any part thereof, of the American river, at, so that the whole of said waters will not flow down its natural channel to

§ 4314. Diverting Water.—Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes, that such quantity was necessary to their use, and that defendant had diverted the same, to their damage, etc. Plaintiffs had verdict, and judgment for twenty-one thousand dollars damages: it was held that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit.¹ That an injunction to restrain a diversion of the water of a stream by a canal in Rhode Island, made by citizens of that state, whereby mills in Connecticut are injured, may be granted in a suit in the circuit court for the district of Rhode Island, brought by citizens of Connecticut, the owners of the mill.²

§ 4315. Diversion for Irrigation—The construction of a reservoir across the bed of a ravine, for the purpose of collect-

¹ McDonald v. Bear River and Auburn Water and Mining Co., 15 Cal. 145.

² Stillman v. White Rock Manufacturing Co., 3 Woodb. & M. 538.

ing the water flowing down the same, to be used in irrigating a garden or fruit trees, gives the party constructing the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he can not be divested by persons subsequently entering for mining purposes, and a court of equity will enjoin miners thus entering from injuring the reservoir or diverting the water therefrom.¹ When there is no pretense that any injury was occasioned willfully by the defendant, and there is no finding of unskillfulness, an injunction will not issue to prevent the exercise of his right to irrigate his crops, although an annoyance or injury may be thereby occasioned to the plaintiffs.²

§ 4316. **Percolating Water.**—Where plaintiffs appropriated, possessed, and used a spring of running water upon land which they occupied; and defendants dug a well upon adjoining land occupied by them; and after the digging of the well the spring dried up, though there was no visible connection between the well and the spring—the flow of water into defendant's land being by percolation: it was held that plaintiffs had no cause of action either for damages or injunction.³

§ 4317. **Watercourse.**—Injunction will lie to compel defendants to restore the waters to their natural beds or channels;⁴ also to restrain the pollution of a stream by which the fish in ponds built by plaintiff were killed.⁵ Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper.⁶ Where the right of the use of running water is based upon appropriation, and not upon ownership of the soil, priority of appropriation gives the superior right.⁷ Possession or actual appropriation must be the test of priority in all claims to the use of water.⁸

§ 4318. **Against Flooding Mining Claim.**

Form No. 1054.

From permitting the flood-gates of the defendant's reservoir to be open in such a manner as that the waters therefrom shall thereby flood the said plaintiff's mining claim in

¹ *Rupley v. Welch*, 23 Cal. 452.

² *Gibson v. Puchta*, 33 Cal. 310.

³ *Mosier v. Caldwell*, 7 Nev. 363.

⁴ *Corning v. Troy Iron and Nail Co.*, 6 How. Pr. 89; S. C., 39 Barb. 311.

⁵ *Seaman v. Lee*, 10 Hun, 607.

⁶ *Marius v. Bicknell*, 10 Cal. 217; consult also *Olmsted v. Loomis*, 9 N. Y. 428; *Belknap v. Trimble*, 3 Paige, 603; *Gardner v. Village of Newburgh*,

2 Johns. Ch. 164; *Corning v. Troy Iron and Nail Co.*, 6 How. Pr. 94; *Bruce v. Del. & Hud. Canal Co.*, 19 Barb. 379; see also *Fairhaven etc. Co. v. Adams*, 46 Vt. 496.

⁷ *Ophir S. M. Co. v. Carpenter*, 4 Nev. 534.

⁸ *Kimball v. Gearhart*, 12 Cal. 29; *Nev. Co. etc. Canal Co. v. Kidd*, 37 Cal. 283.

canyon, and thereby make it inconvenient or impossible for plaintiff to work said mine.

§ 4319. **Water for Mining Purposes.**—A complaint alleging that plaintiffs had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof, when defendants wrongfully diverted the same and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction.¹ Where plaintiff owns a mining ditch with right of way for it, having acquired such right by priority of location, the court should not, in an action to enjoin another party from washing it away, limit the plaintiff's right by allowing the ditch to be washed away if defendant would build a flume or other aqueduct to replace it; but should enjoin the washing away of the ditch.² No equitable remedy can be had for a mere past diversion of a watercourse; but when the injury is continuing, relief may appropriately be sought in equity.³ Plaintiffs are owners of mining claims located in the bed of a creek, and defendants own claims situated on a hill in the vicinity. The refuse matter washed from defendants' claims is deposited on plaintiffs' claims to such an extent as to render the working of them impracticable. Plaintiffs' claims were first located, and are valuable only for the gold they contain: it was held that plaintiffs are entitled to damages for the injuries done their claims by such deposit, and to an injunction against the same in future; that the enjoyment of their claims lies in the use necessary to obtain the gold, and that to interrupt this use is to take away the opportunity to enjoy, and defeat the object for which they were located and taken possession of.⁴

§ 4320. **Against Building Pier or Wharf.**

Form No. 1055.

From constructing, or causing to be construed, a certain wharf at, whereby vessels can not enter or leave with convenience or safety at plaintiff's wharf, which wharf extends from the foot of street into the bay [or state facts as they exist].

§ 4321. **Commerce.**—A nuisance injurious to the commerce of a town may be enjoined at the suit of a private individual

¹ Tuolumne Water Co. v. Chapman, 8 Cal. 392.

² Gregory v. Nelson, 41 Cal. 278.

³ Tuolumne W. Co. v. Chapman, 8 Cal. 392.

⁴ Logan v. Driscoll, 19 Cal. 623.

owning property in such town, and being himself engaged in its commerce.¹

§ 4322. **Ferry Rights.**—An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce, without the regularity or purpose of ferry trips; that remedy applies only to one which is run avowedly as a ferry-boat.²

§ 4323. **Obstructing Highways.**—It is material for a complainant suing for an injunction to prevent a threatened destruction of a river to state that he is engaged in navigating the waters of the same.³ A bill was filed to restrain a railway company from placing an obstruction partly on a public way and partly on the land of the plaintiff, a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury caused by the continuance of the obstruction would be irreparable, and that the act was done without any color of title. On demurrer it was held that this was a case in which the court would enjoin trespass by a stranger.⁴ But where a railroad company was chartered with the privilege of running its road from such a point within an incorporated city as the city officers should designate, and a point was designated, and the railroad authorized to lay its tracks along certain streets, it was held that no public nuisance was thereby created, and that a court of equity would not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, where no private injury or threatened injury was alleged to such citizens or their property.⁵ It is, however, the settled law of Wisconsin that an obstruction which prevents a lawful use of a public highway, besides being a public nuisance, is a special injury to adjoining lot-owners, against which, when threatened, they may have an injunction.⁶

§ 4324. **Wharfs.**—Where the court is satisfied that a wharf erected in tide-waters and upon soil thereunder belonging to the state is not a public nuisance, an injunction should be refused, or dissolved if one has been temporarily granted.⁷ The district courts, as courts of equity, have no power to decree the destruction, or to enjoin a purpresture caused by the erection

¹ See *Works v. Junction Railroad*, 5 McLean, 425. *v. Lancashire and Yorkshire Railroad Co.*, L. R., 4 Eq., 174.

² *Conway v. Taylor*, 1 Black, 603.

³ *Spooner v. McConnell*, 1 McLean, 337.

⁴ *London and N. W. Railroad Co.*

⁵ *Coast Line R. R. Co. v. Cohen*, 50 Ga. 451.

⁶ *Pettibone v. Hamilton*, 40 Wis. 402.

⁷ *People v. Davidson*, 30 Cal. 379.

of a wharf in tide-waters, and upon the soil thereunder belonging to the state, without a license from the state, unless it is or will be a public nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be a hinderance to the execution of some legislative act relating to fishery or to commerce or navigation.¹ A person who is the owner and in possession of a private wharf is entitled to a perpetual injunction restraining the construction of another wharf in front of his, which will cut off his wharf from the navigable waters, unless the persons constructing the same show a lawful right, proceeding from competent authority, to erect the proposed wharf. And a statute authorizing such construction must be strictly followed.² The remedy to prevent erecting a nuisance in a bay or navigable river is by injunction at the suit of the attorney general.³ But an injunction will not be granted to restrain the erection of what may possibly prove a nuisance.⁴

§ 4325. Against Selling or Disposing of Partnership Property.

Form No. 1056.

That defendant be restrained from selling, assigning, or otherwise disposing of any of the property, personal or real, belonging to the copartnership above named, and from collecting, receiving, or otherwise handling said property, or any part thereof, except to retain the same; from changing position of or transporting, moving, or conveying any of the personal property or moneys of said copartnership.

§ 4326. Interference with Partnership Property.—An injunction forbidding defendant to interfere with “any of the said partnership property, or from collecting the partnership debts or other moneys,” but containing no reference whatever to any particular firm or copartnership business, is not sufficiently definite to put the defendant in contempt.⁵

§ 4327. Publications Enjoined against Publishing Book.

Form No. 1057.

From printing, publishing, selling, or exposing for sale, or causing or being in any way concerned in the printing, publishing, or selling, or exposing to sale, or otherwise disposing

¹ People v. Davidson, 30 Cal. 379.

² Cowell v. Martin, 43 Cal. 605.

³ 2 Wat. Eden on Inj. 259; People v. Vanderbilt, 26 N. Y. 287; S. C., 28 Id. 396; 25 How. Pr. 139; People v. Vanderbilt, 38 Barb. 282.

⁴ Ramsay v. Riddle, 1 Cranch C. C. 399.

⁵ Moat v. Holbein, 2 Edw. Ch. 188; consult also Smith v. Jeyes, 4 Beav. 503; 4 Sandf. 716; 8 Ves. 317; Hall v. Hall, 12 Beav. 414; Whittaker v. Howe, 3 Id. 388; Miles v. Thomas, 9 Sim. 609; 4 Abb. Pr. 394.

of any copies of [describe the book], or any other book purporting to be or to resemble the book so printed, published, and sold by or for plaintiff.

§ 4328. **Injunctions' against Publications.** — Although an account of profits may be decreed to the owner of a copyright, as incidental to the relief by injunction, it must be prayed for in the bill. It can not be decreed if the bill contains neither a prayer for an account nor for general relief.¹ Publication of legal proceedings can not be restrained by injunction.² So also publication of a libel can not be restrained,³ as chancery has no jurisdiction to restrain the publication of a libel, as such, even if it is injurious to property.⁴ Nor will the publication of a threatened libel be enjoined.⁵ The publication of a manuscript, or any substantial part thereof, without the author's consent, may be enjoined.⁶ Thus, the publication of private letters, without the writer's consent, may be restrained.⁷

§ 4329. **Against Publishing Private Letter.**

Form No. 1058.

From printing, publishing, selling, or causing to be sold or exposed for sale, or circulating, or in any manner, either by writing or otherwise, making public a letter written by, on or about the day of, 18.., and forwarded to, at, or any part thereof [or for a number of letters written by A. B. to C. D., between the day of, 18.., and the day of, 18..].

§ 4330. **Attorney at Law.**—An attorney who has appeared for one party in a cause may be enjoined from appearing for the other party, and from communicating any knowledge which the confidence of his relation had given him.⁸ This is certainly law as well as good morals, but it is feared that even a restraining order would not succeed in keeping those who desired to from divulging facts within their knowledge. It would seem a mo-

¹ *Baily v. Taylor*, 1 Russ. & M. 73; *Co. v. Apollinaris Co.*, L. R., 10 Ch. App., 297.
Colburn v. Simms, 2 Hare, 550; *Stevens v. Cady*, 2 Curt. C. C. 200.

² *Wood v. Marvin*, 3 Duer, 674.

³ *Brandreth v. Lance*, 8 Paige, 24.

⁴ *Prudential Assurance Co. v. Knott*, L. R., 10 Ch. App., 142.

⁵ *Clay v. Marriott*, Cal. Sup. Ct., July Term, 1878. See also *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69; *Singer etc. Co. v. Domestic etc. Co.*, 49 Ga. 70; *Celluloid Manufacturing Co. v. Goodyear etc. Co.*, 13 Blatchf. 375. As to publication of apology alleged to have been obtained by duress, see *Fisher &*

⁶ *Bartlett v. Crittenden*, 5 McLean, 32.

⁷ *Id.* As to restraining publication, see *Woolsey v. Judd*, 4 Duer, 385; S. C., 11 How. Pr. 49, and other cases there cited; *Prince Albert v. Strange*, 1 Mac. & G. 25; *Gretton v. Haward*, 2 Swanst. 424; *Thompson v. Stanhope*, Amb. 737; *Pope v. Cerol*, 2 Atk. 342; *Prince Albert v. Strange*, 1 Hall & Tw. 1, 28; see "Trade-mark," *post*.

⁸ *Cholmondeley v. Clinton*, 19 Ves. 261.

tion for such an injunction may be made in the course of such action, without commencing a new action against the attorney.¹

§ 4331. **Against Use of Secret in Trade.**

Form No. 1059.

From selling, or causing or procuring to be sold, under the title and designation of "Walker's Vinegar Bitters," any medicine made or manufactured by the defendant, or by or under his order or direction; and from making or compounding any medicines according to the secret in the complaint mentioned, etc., and from in any manner using the secret of compounding the said medicines, or any part thereof.²

§ 4332. **Property Held in Trust.**—Where a specific article, or a specific sum of money, is held in trust for plaintiff by defendant, the court will enjoin the latter from disposing of or removing it, as a breach of trust, how ample soever the pecuniary responsibility of the defendant may be.³ It is aptly said by the court in the following case, that as it presents an element of trust, it is so peculiarly equitable in its nature that an injunction will be granted under circumstances which but for the element of trust would be entirely insufficient. So a court will not restrain the publication of a secret communicated under a contract not to reveal it, but it will certainly enjoin the same if acquired surreptitiously and in breach of confidence.⁴ A *cestui que trust* may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property improperly.⁵ An injunction may be granted to restrain two or three trustees of a private trust from making a contract to the prejudice of one of their *cestuis que trust*, and to their profit, without the assent of the third trustee—he being the representative of the *cestui que trust* who will be prejudiced by such contract.⁶

§ 4333. **Publication of a Secret**, although in violation of a contract, can not be restrained;⁷ unless obtained through surreptitious means, when it may be.⁸ And where defendant had been in the confidential employ of plaintiff, and had taken extracts from his books and papers, and afterward threatened to

¹ Cholmondeley v. Clinton, 19 Ves. 261.

² A similar form will be found in Morison v. Moat, 9 Hare (41 Eng. Ch.), 241.

³ Merritt v. Thompson, 3 E. D. Smith, 296.

⁴ Yovatt v. Winward, 1 Jac. & W. 394.

⁵ St. Luke's Hospital v. Barclay, 3 Blatchf. 259.

⁶ Sloo v. Law, 3 Blatchf. 459.

⁷ Deming v. Chapman, 11 How. Pr. 384; Jones v. Jones, 3 Meriv. 160; Newbery v. James, 2 Id. 450.

⁸ Yovatt v. Winyard, 1 Jac. & W. 394.

publish the same, he was not only enjoined from so doing, but also from keeping any copies of such extracts in his possession.¹

§ 4334. **Against Public Officers—Quo Warranto, from Usurping Office.**

Form No. 1060.

From usurping, taking possession of, interfering with, or in any manner disturbing the plaintiff in the use, enjoyment, advantages, or benefits of [describe office], and from taking the fees or emoluments of said office, and from doing any act under or by the name of said office.

§ 4335. **Abuse of Process.**—The United States circuit court has jurisdiction in equity on bill or petition filed, and proper case made, to restrain the use of its process by the marshal in a manner contrary to law.²

§ 4336. **Irregular Assessment.**—The fact that the assessment for state and county taxes for 1855–6, in San Francisco county, was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the board of equalization if aggrieved.³ Where an assessment and sale for taxes would be void, and the matters making them void do not appear on the face of the tax collector's deed, but must be shown by extrinsic proof, and the deed upon its face would be *prima facie* valid, injunction lies to restrain the sale.⁴ An individual whose property is assessed without authority from a municipal corporation, for a local improvement, may maintain an action to enjoin its collection, not only on the ground of avoiding a multiplicity of suits, but also to remove the cloud on the title;⁵ and the objection that all persons united in interest are not joined as plaintiffs is waived if not set up by the pleading.⁶

§ 4337. **Against Taking Office.**—An injunction does not issue to restrain a party from taking possession of an office and its books and papers under color of title thereto.⁷ Nor will injunction issue at the instance of one who claims an office under an election by the people, to restrain the payment of the salary to the incumbent, pending the trial of a contest of the right to the office, unless the bill shows that an action at law for the salary received by the incumbent would be abortive.⁸ Injunc-

¹ *Evitt v. Price*, 1 Sim. 483.

² *Gibbs v. Usher*, 1 Holmes, 348.

³ *Merrill v. Gorham*, 6 Cal. 41.

⁴ *Burr v. Hunt*, 18 Cal. 303.

⁵ *Heywood v. City of Buffalo*, 14 N. Y. 534.

⁶ *Ireland v. City of Rochester*, 51 Barb. 414.

⁷ *Coulter v. Murray*, 15 Abb. Pr., N. S., 129.

⁸ *Colton v. Price*, 50 Ala. 424.

tion against public officers by their individual names would not bind their successors or the public.¹

§ 4338. **Taxes and Assessments.**—In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof; and in such case, to grant an injunction is error.² *Quære*, whether a taxpayer can interfere by injunction to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation.³ An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection to the owner would be irreparable. An averment of this character must appear in the bill, and if denied, it must be sustained at the hearing.⁴ The collection of a tax, even though illegal, if attempted to be collected by legal officers, can not be restrained by injunction.⁵ And the same is held in the case of an assessment by local authorities.⁶ Nor is interference proper on the ground that the officials who imposed the assessment were legally disqualified from holding office.⁷ But the United States supreme court has enjoined the collection of an unconstitutional tax.⁸ A court will not restrain a sale for taxes, when it is apparent upon the face of the proceedings, upon which the purchaser must rely to make out a

¹ *Magee v. Cutler*, 43 Barb. 239. As to injunction against officers generally, restraining them from acting, see *Hartwell v. Armstrong*, 19 Barb. 175; *Thompson v. The Comm'rs etc.*, 2 Abb. Pr. 251; *Fitzpatrick v. Flagg*, 5 Id. 213; *Lewis v. Oliver*, 4 Id. 121, 333; *Phoenix v. The Comm'rs etc.*, 1 Id. 466; *Vanderwerken v. N. Y. & N. H. R. R.*, 6 Id. 296; *Fuller v. Allen*, 7 Id. 12; *Gillespie v. Broas*, 23 Barb. 370; *Leigh v. Westervelt*, 2 Duer, 618. As to officers of corporations, see *Bostock v. North Staffordshire R. R.*, 3 Sm. & G. 283; 19 Eng. L. & Eq. 307; see also Cal. Code C. P., sec. 531.

² *Minturn v. Hayes*, 2 Cal. 590.

³ *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175.

⁴ *Ritter v. Patch*, 12 Cal. 298.

⁵ So held in *Wilson v. Mayor of N. Y.*, 1 Abb. Pr. 4; *Chemical Bank v. Mayor of N. Y.*, Id. 79; *N. Y. Life Ins. Co. v. Supervisors of N. Y.*, Id. 250; S. C., 4 Duer, 192; *Dodd v. City of Hartford*, 25 Conn. 237; and on the same subject the following cases: *Wells, Fargo & Co. v. Dayton*, 11 Nev.

161; *Nunda v. Crystal Lake*, 79 Ill. 311; *Hagenbuch v. Howard*, 34 Mich. 1; *R. G. R. R. Co. v. Scanlan*, 44 Tex. 649; and *State R. R. Tax Cases*, 92 U. S. 575.

⁶ *Heywood v. City of Buffalo*, 14 N. Y. 534; *Blake v. City of Brooklyn*, 26 Barb. 301; *Bowton v. City of Brooklyn*, 15 Id. 375; *Mayor etc. v. Meserole*, 26 Wend. 132; *Sayre v. Tompkins*, 23 Mo. 443; see *Burnet v. Cincinnati*, 3 Ohio, 73; *Culbertson v. Cincinnati*, 16 Id. 574; *Jones v. Cincinnati*, 18 Id. 318; *McCoy v. Cincinnati*, 3 Id. 370; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *De Baun v. The Mayor*, 16 Barb. 392; *Wilson v. The Mayor etc.*, 4 E. D. Smith, 675; *Mutual Benefit Life Ins. Co. v. Board of Supervisors*, 9 Bosw. 683; *Susquehanna Bank v. Supervisors of Broome*, 25 N. Y. 312; but see *Foote v. Linck*, 5 McLean, 616; *Woolsey v. Dodge*, 6 Id. 142.

⁷ *Thatcher v. Dusenbury*, 9 How. Pr. 32.

⁸ *Dodge v. Woolsey*, 18 How. U. S. 340.

prima facie case to enable him to recover under the sale, that the sale would be void.¹ A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made *prima facie* evidence of title;² or the sale of real property under an illegal assessment.³ Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city.⁴ It seems that if the injunction bill had been filed before the work was commenced, the court would have felt bound to inquire into the regularity of the assessment.⁵

§ 4339. **When Injunction will and will not Lie.**—An injunction may be issued to restrain public officers from proceedings taken under an unconstitutional statute which involves the imprisonment of the plaintiff.⁶ That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the state interest within the water-line is invalid.⁷ An injunction restraining the city officers from making payment of sums for which the city is liable can not be sustained.⁸ Nor will the court restrain public officers from issuing bonds authorized by law, upon apprehension that the public officer will misapply their avails.⁹ Nor will an injunction be granted to restrain a board of supervisors from incurring liabilities which are not a legal charge against a county.¹⁰

§ 4340. **Who can not be Enjoined.**—The government can not be enjoined.¹¹ The president can not be enjoined;¹² nor heads of United States departments.¹³ In a case where the process of injunction can not reach the principal, who is the true source of the mischief, and in the case of a sovereign state exempt from all judicial process, an injunction may be awarded

¹ Bucknall v. Story, 36 Cal. 67.

² Palmer v. Boling, 8 Cal. 388; Fremont v. Boling, 11 Id. 387; but see Robinson v. Gaar, 6 Id. 275.

³ See Heywood v. City of Buffalo, 14 N. Y. 545; Van Doren v. Mayor of New York, 9 Paige Ch. 390.

⁴ Weber v. The City of San Francisco, 1 Cal. 455.

⁵ Id.

⁶ Holt v. Commissioners of Excise, 31 How. Pr. 334.

⁷ Guy v. Hermance, 5 Cal. 73; Stone v. Elkins, 24 Id. 127.

⁸ Hecker v. Mayor of N. Y., 18 Abb. Pr. 369; S. C., 28 How. Pr. 211.

⁹ Faulkner v. Metcalf, 43 Barb. 255.

¹⁰ Linden v. Case, 46 Cal. 171; see also People v. Canal Board of N. Y., 55 N. Y. 390; Dunham v. Village of Hyde Park, 75 Ill. 371; and Brush v. City of Carbondale, 78 Id. 74; also Cal. Civil Code, secs. 3422, 3423.

¹¹ Hill v. United States, 9 How. U. S. 386; United States v. McLemore, 4 Id. 286.

¹² Mississippi v. Johnson, 4 Wall. 475.

¹³ Walker v. Smith, 21 How. U. S. 579.

to restrain the agent who is to be made the instrument of the wrong. The privilege of the principal is not communicated to the agent.¹

§ 4341. In Trespass—Against Undermining Plaintiff's Land.

Form No. 1061.

From digging, undermining, excavating, or removing any soil from any land adjoining the plaintiff's premises [describing them], which shall cause the plaintiff's land, by reason of the removal of the said earth, to fall away or subside.²

§ 4342. Discretion of Court.—The granting and continuing of injunction in cases of alleged trespasses on land claimed by plaintiff, where the injury is likely to be irreparable, are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured.³ In the case of *Slade v. Sullivan*, 17 Cal. 102, the supreme court refused to interfere with the discretion of the court below, in denying an injunction sought by a settler upon public mineral lands, to protect his improvements—a dwelling-house, milk-house, barn, garden, dam, etc.—against miners who were working the bed of a ravine a short distance in front of the house.

§ 4343. Party-wall.—Where plaintiff's wall, laid on his own land, projects over the defendant's land, the court will not compel the defendant to desist from using it as a party-wall.⁴

§ 4344. Stopping Work of Mine.—If the plaintiffs permit the defendants to remain in possession of a mining claim several months, without interference, working it as their own, and expending large sums of money in developing it, a court of equity will require a very clear and strong showing to induce it to grant or entertain a preliminary injunction to stop the work.⁵ When the title of the property is in dispute, the question whether the defendants are solvent and able to respond in damages forms an important element in passing upon an application for an injunction pending the litigation.⁶

§ 4345. Tearing down Fences.—When a complaint, in an action to restrain the commission of trespass, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's

¹ *Osborn v. Bank of United States*, 9 Wheat. 738.

² See, as to form on this subject, *Farrand v. Marshall*, 19 Barb. 380.

³ *Hicks v. Compton*, 18 Cal. 206.

⁴ *Guttenberger v. Woods*, 51 Cal. 523.

⁵ *Real del Monte Co. v. Pond*, 23 Cal. 82.

⁶ *Id.*

land, under a claim of right founded on an order of a board of supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a court of law has decided against him, it does not state facts sufficient to constitute a cause of action.¹ Courts of equity may restrain the commission of a trespass about to be committed, by taking down fences and opening a road through the plaintiff's land, in pursuance of an order of the board of supervisors, prematurely made.² The threatened injury must be irreparable³ and irremediable.⁴ An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered is a sufficient statement of title in a suit for injunction to restrain trespass.⁵

§ 4346. **When Injunction does and does not Lie.**—An injunction lies to restrain the persistent commission of trespasses, even of a mere personal nature, where they affect a corporate franchise.⁶ And where the injury is in its nature a continuing one, and the remedy at law be by successive suits, and an action for damages will be wholly inadequate to protect plaintiff's rights, he will not be put to his remedy at law.⁷ In Indiana it is not necessary that the injury be irreparable; if it can not be fully compensated in damages, injunction will lie.⁸ When the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house on and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation, it was held that the plaintiff sets forth no principle on which to base a claim.⁹ For an apprehended trespass, unless under very special circumstances, injunction will not be allowed.¹⁰ Injunction can not be granted, however clear the original right may be, if the trespass be complete and perfect.¹¹ Nor will it be granted where

¹ Leach v. Day, 27 Cal. 643.

² Grigsby v. Burtnett, 31 Cal. 406; More v. Massini, 32 Id. 590.

³ Hart v. Mayor etc., 9 Wend. 571; Jerome v. Ross, 7 Johns. Ch. 315; Sixth Avenue R. R. Co. v. Kerr, 28 How. Pr. 382; affirming S. C., 45 Barb. 138.

⁴ Spooner v. McConnell, 1 McLean, 337.

⁵ Hicks v. Compton, 18 Cal. 206.

⁶ Stage Horse Cases, 15 Abb. Pr., N. S., 51.

⁷ Shiner v. Morris Canal etc. Co., 27 N. J. Eq. 364.

⁸ Clarke v. Jeffersonville etc. R. R. Co., 44 Ind. 248.

⁹ O'Conner v. Corbitt, 3 Cal. 370.

¹⁰ For examples as to circumstances which have been considered sufficient, see Mayor of N. Y. v. Conover, 5 Abb. Pr. 178; and see generally, on this topic. Marshall v. Peters, 12 How. Pr. 218; Akrill v. Selden, 1 Barb. 317.

¹¹ Moreland v. Richardson, 22 Beav. 604; Deere v. Guest, 1 Myl. & Cr. 516; Attorney General v. N. J. R. R., 2 Green Ch. 141; see Perkins v. Warren, 6 How. Pr. 348.

the party complaining has a complete and adequate remedy at law.¹ And although equity may interfere in a case of trespass to prevent irreparable mischief and multiplicity of suits, still if the trespass be but fugitive and temporary, and adequate compensation can be had at law, no injunction should be granted.² Nor will a naked trespass be enjoined where no waste is committed.³

§ 4347. **Trade-marks.—From Using Plaintiff's Trade-mark.**

Form No. 1062.

From selling, exposing for sale, or causing to be sold [state what], or any other article or thing with similar labels to the plaintiff's, as hereinafter described, or in like boxes, or with like or similar devices thereon, in any manner or by any means, so that the article so put up or sold will be taken for that which this plaintiff has hitherto put up and sold under the name and style and by the device, etc., of [describe devise particularly].⁴

§ 4348. **Deceptive Trade-mark.**—Where a deception is practiced upon the public by one who uses or imitates the trade-mark of another, with a fraudulent intent, to recommend to purchasers an article similar in appearance to one already made and favorably known in the market, an injunction will be granted to restrain it.⁵ A picture may be matter of trade-mark.⁶

§ 4349. **Against Infringement of Sign.**

Form No. 1063.

From running, or in any manner using or causing to be used, for the conveyance of passengers, any omnibus having painted, stamped, printed, or written thereon the words or names, "London Conveyance," or "Original Conveyance for Company," or any other names, words, or devices, painted, stamped, printed, or written thereon in such manner as to form or to be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs.⁷

§ 4350. **Waste—Affidavit to Obtain Order to Restrain Waste.**

Form No. 1064.

[TITLE.]

[VENUE.]

A. B., the plaintiff above named, being duly sworn, says as follows:

¹ Leach v. Day, 27 Cal. 643.

² Minnig's Appeal, 82 Pa. St. 373.

³ Nevada Co. and Sac. Canal Co. v. Kidd, 37 Cal. 282.

⁴ See Cal. Pol. Code, sec. 3199, and also notes and authorities, vol. 2, sec.

2827 et seq. For another form, see Croft v. Day, 7 Beav. 84.

⁵ Coffeen v. Brunton, 4 McLean, 516.

⁶ Faulkinburg v. Lucy, 35 Cal. 52.

⁷ This form was sustained in Knott v. Morgan, 2 Keen, 213.

I. This action is brought [state the object of the action], and all the allegations of said complaint are true to the knowledge of the deponent.

II. On or about the day of the present month of, the defendant proceeded to cut and take off, and put up in cord-wood, the wood and timber then growing and being on said premises, and has now cut and piled up on said premises, ready to be taken therefrom, as I am informed and believe, several hundred cords of said cord-wood, of the value of dollars; and I further say that the said wood and timber so cut and corded is not required for the necessary reparation of any fences, buildings, or erections which were upon said premises at the time of the said sale, nor for the necessary fire-wood for the use of the family of the said; but, to the contrary thereof, I am informed and believe that the said defendant has made preparations to destroy the remaining wood and timber growing upon said premises, and continues daily to cut the same; and I am also informed and believe that the said defendant, together with one C. D., and others whose names are unknown to me, and to whom the said defendant has contracted or proposed to dispose of said wood, or a portion thereof, threaten to, and are actually proceeding, with their boatmen, cartmen, servants, and persons in their employ, to take and remove and dispose of the said cord-wood, wood, and timber. I further say that the land so sold by me is valuable principally for the sake of said wood and timber, and that the destruction thereof, as aforesaid, is a permanent injury to the freehold. And the said defendants, after the removal of said wood, as I am informed and verily believe, intend to abandon said land when the said wood is so removed; and by such removal of said wood, the security for the amount yet due me on the purchase of said land will be lost and rendered of no value.

III. The defendant is wholly insolvent, and unable to answer the plaintiff in damages in the premises; and, as I verily believe, I will be left without remedy as to the timber already cut, unless the defendant is enjoined from removing or interfering with it.

§ 4351. **Affidavit, What should State.**—It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right.¹ On a motion for injunction to enjoin waste, the

¹ Waldron v. Marsh, 5 Cal. 119.

complainant can not, on bill and answer, read affidavits in support of his title.¹

§ 4352. Statement on Motion Enjoining Waste.

Form No. 1065.

From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part thereof, or from committing any waste, spoil, or destruction upon the said premises, and removing the fences therefrom, or destroying or cutting down the timber thereon, and from executing and procuring to be executed any conveyance of the said premises to any person or persons other than to the plaintiff, or as he shall direct.

The said premises are known as, and are bounded and described as follows [description].

§ 4353. Removal of Building.—An injunction will not be granted at the suit of the landlord to restrain the tenant from removing from the demised premises a building erected by him, if it appears that the security for the rent will thereby be merely impaired and lessened in value. It must appear that such security will be left inadequate to secure the rent.²

§ 4354. Removal of Machinery.—Equity has undoubted jurisdiction to interfere by injunction in favor of the owner of the reversion to stay or prevent waste threatened or being committed by tenant for life or years; and where it appears that certain machinery, belonging to plaintiff and part of his mill property, was about to be removed by defendants, who were tenants in possession, to the great and irreparable injury of plaintiff and his property, it was held sufficient to warrant an injunction, without alleging the insolvency of defendants.³

§ 4355. Against Waste by Cutting Timber.

Form No. 1066.

From cutting down, felling, barking, or otherwise wasting or injuring any timber-trees, and from felling, digging up, or removing any ornamental trees therein, or underwood standing and growing on [designate the premises], and from committing any further or other waste or spoil in or upon the said land and premises.

§ 4356. Timber Already Cut.—In an action for waste in cutting timber, it may be questionable whether injunction is proper as to timber already cut, but the court may require the defendant (having acquired jurisdiction) to give security to account, as a condition of modifying the injunction in this respect.⁴

¹ United States v. Parrott, 1 McAll. 271.

² Poertner v. Russel, 33 Wis. 193.

³ Perrine v. Marsden, 34 Cal. 14. ⁴ Weatherby v. Wood, 29 How. Pr. 404.

§ 4357. **When Issued.**—Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful; the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings if there be danger of irreparable mischief.¹

§ 4358. **Against Destroying Ornamental Trees.**

Form No. 1067.

From committing waste, spoil, or destruction on [designate the premises], and from cutting down any timber or other trees growing upon the said estates, which are planted or growing there for the ornament of the said house, or which grow in lines, walks, vistas, or otherwise for the ornament of said houses, or of the gardens, parks, or pleasure-grounds thereunto belonging; and also to restrain him, his servants, workmen, and agents, from cutting down any timber or other trees, and from changing or removing the walks or drives therein, or widening or moving the same.

§ 4359. **Injury Irreparable.**—Plaintiff takes up two hundred and twelve acres of land under the possessory act of this state, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses—claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sued for damages for the trespasses committed, and asks a perpetual injunction against future trespasses. Verdict: “We, the jury, award the plaintiff forty-two dollars damages.” Judgment accordingly, the court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit: it was held that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that the nature of the property destroyed, and threatened to be destroyed, is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him.²

§ 4360. **Against Working a Mine.**

Form No. 1068.

From working the ledges, veins, spurs, angles, or seams of gold, silver, copper, or iron, and other minerals lying in, upon,

¹ Hicks v. Michael, 15 Cal. 107.

² Daubenspeck v. Gear, 18 Cal. 443.

or under the [designate lands], and from digging, extracting, getting, and carrying away or selling or disposing of the gold, silver, copper, iron, and other minerals produced therefrom, or from mining any quartz or other rock which contains the same.

§ 4361. **Mining Claim.**—When the title to a mining claim is in controversy, an injunction may be granted to preserve the property pending the litigation.¹

§ 4362. **Mortgagee, when Entitled to.**—Where mortgagor in possession threatens waste which involves irreparable injury to the land, and will render the security inadequate, the mortgagee is entitled to an injunction to stay waste without alleging the insolvency of the mortgagor.²

§ 4363. **Appeal from Order.**—An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal.³ An injunction is not dissolved or superseded by appeal taken.⁴ So a pendency of motion for new trial does not operate as a suspension of an injunction.⁵

§ 4364. **Bonds Given.**—The usual bond being given, an order was made to show cause (August 29th) why an injunction should not issue. A restraining order in the “mean time” issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond: it was held that the restraining order embraces the time between its issuance and the hearing, and the damages may be had beyond August 29th.⁶ Even if a chancellor has no power, under the statute, to require an undertaking upon the issuance of the restraining order, still having taken jurisdiction of the general subject of litigation, he has power aside from the statute to order such undertaking, or to make any other order in the progress of the case for the furtherance of the objects of the litigation and the protection of its subject-matter.⁷

§ 4365. **Hearing.**—If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.⁸

¹ Hess v. Winder, 34 Cal. 270.

² Fairbank v. Cudworth, 33 Wis. 358.

³ Hicks v. Michael, 15 Cal. 107.

⁴ Merced Mining Co. v. Fremont, 7 Cal. 130.

⁵ Ortman v. Dixon, 9 Cal. 23.

⁶ Prader v. Grim, 13 Cal. 585.

⁷ Prader v. Purkett, 13 Cal. 588.

⁸ Cal. Code C. P., sec. 530; N. Y. Code, sec. 609.

§ 4366. **Order to Show Cause.**—The object of the practice of issuing an order to show cause before granting the injunction is to enable the parties to present the case on the merits.¹ Where an order is made to show cause why an injunction should not be granted, and restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expires by limitation.² In a California case it was held that the temporary injunction granted on filing the complaint should not have been dissolved before the hearing; that on the facts stated in the complaint, an action for damages would be fruitless; that although the complaint does not aver absolute insolvency of defendants, still enough is averred to satisfy the court that a judgment for damages would be worthless, and hence the injunction ought to have been continued.³

§ 4367. **Injunction Order after Order to Show Cause.**

Form No. 1069.

[TITLE.]

On the return of the order to show cause made by me in the above-entitled action, on the day of, 18..., and returnable this day, after hearing E. F. for the plaintiff, and G. H. for the defendant, no sufficient cause to the contrary being shown:

It is ordered that the said order to show cause be, and the same hereby is, made absolute, on the said plaintiff executing and filing a written undertaking pursuant to the statute and the practice of the court, to the effect that he will pay the said defendant such damages, not exceeding the sum of dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto. And I order that the said defendant, and his agents and servants, be enjoined and restrained [state acts to be enjoined] until the further order of the court.⁴

[DATE.]

[SIGNATURE.]

§ 4368. **Insufficient Grounds.**—In a bill for an injunction to restrain defendants from taking possession of certain real estate, a warehouse, and wharf, the complaint averred plaintiff's title to the property, and their possession; that defendants have

¹ Hicks v. Michael, 15 Cal. 107.

² Id.

³ Hicks v. Compton, 18 Cal. 206.

⁴ It will be readily observed by the practitioner that the language of each restraining order is necessarily changed according to the facts of

each case, and the object being to inform the party against whom the order runs, in clear and unmistakable terms, what he is forbidden from doing, the briefer the order the clearer it will be; lengthy and wordy injunction orders should be avoided.

conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises; and that unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: it was held that these allegations are insufficient to authorize an injunction, there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law.¹ The answer in chancery of a corporate body under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted.² A mere denial in the answer of the equity of the bill will not prevent the court from looking into the law and the facts of the case on a motion for a special injunction, and granting or refusing it, according to its discretion.³

§ 4369. **Form.**—No particular form of order to restrain is necessary. The substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then, at their peril, obey.⁴ The language should be so clear and explicit that an unlearned man can understand it, without employing counsel to advise him what he has a right to do;⁵ and should contain sufficient to apprise the party what he is restrained from doing, though how far actual knowledge of its purpose on the part of the defendant may affect this, *quære*.⁶

§ 4370. **Title to Property.**—There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction when the averment of his right in the complaint is admitted by demurrer.⁷

§ 4371. **To Whom Directed.**—Though an injunction should not in general be directed to persons not parties in the action,⁸

¹ Tomlinson v. Rubio, 16 Cal. 202.

² Haight v. Proprietors of the Morris Aqueduct, 4 Wash. C. C. 601.

³ Clum v. Brewer, 2 Curt. C. C. 506.

⁴ Summers v. Farish, 10 Cal. 347.

⁵ Laurie v. Laurie, 9 Paige Ch. 234; Clark v. Clark, 25 Barb. 76.

⁶ See Sullivan v. Judah, 4 Paige Ch. 444; Byam v. Stevens, 4 Edw. Ch. 119.

⁷ Tuolumne Water Co. v. Chapman, 8 Cal. 392.

⁸ Iveson v. Harris, 7 Ves. 257; Fellows v. Fellows, 4 Johns. Ch. 25; Watson v. Fuller, 9 How. Pr. 425; People v. Judges of the N. Y. Common Pleas, 3 Abb. Pr. 181; Bloomfield v. Snowden, 2 Paige, 355; Sage v. Quay, Clarke, 347; Edmonston v. McLoud, 19 Barb. 361.

yet the defendant can not object to it on this ground.¹ But it is usual and proper to express that the agents, attorneys, and servants of the defendants are enjoined; whether they are named or not, they are bound by it, if they have notice of it.² It seems in New York the court will not enforce obedience of such an injunction on an *ex parte* application for an attachment;³ and an injunction against persons not parties is operative only as a notice to such.⁴

§ 4372. **When may be Granted.**—Granting and continuing injunctions rests very much in the sound discretion of the court, to be governed by the nature of the case;⁵ and this discretion should always be exercised in favor of the party most liable to be injured.⁶ The abuse of discretion in granting the writ of injunction should be guarded against.⁷ An order or writ may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, may be enforced as the order of the court.⁸

§ 4373. **Service of Injunction.**—When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction.⁹ The statute of California points out no mode for service of an injunction; but it has been held in a recent case that the writ may be served by any person authorized to serve a summons; but in conformity with the provisions relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is here expressed.¹⁰ When granted upon affidavit, a copy of the affidavit must be served with the injunction.¹¹ A writ placed in the sheriff's hands on Sunday can not be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired.¹² A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him; giving him verbal notice that an order enjoining him has been made is not sufficient.¹³ It seems if a party be in court at the

¹ *Tradesman's Bank v. Merritt*, 1 Paige, 304.

² *Mayor of N. Y. v. Conover*, 5 Abb. Pr. 252; *Morton v. Superior Court*, 3 West Coast Rep. 448; *Golden Gate Con. Hy. M. Co. v. Superior Court*, 2 Id. 736.

³ *Watson v. Fuller*, 9 How. Pr. 426.

⁴ *Sage v. Quay, Clarke*, 348; *Edmonston v. McLoud*, 19 Barb. 361.

⁵ *Hicks v. Michael*, 15 Cal. 107.

⁶ *Hicks v. Compton*, 18 Cal. 206.

⁷ *De Witt v. Hays*, 2 Cal. 463.

⁸ Cal. Code C. P., sec. 525; N. Y. Code, sec. 606.

⁹ Cal. Code C. P., sec. 527.

¹⁰ *Edmondson v. Mason*, 16 Cal. 386.

¹¹ Cal. Code C. P., sec. 527.

¹² *Whitney v. Butterfield*, 13 Cal. 335.

¹³ *Elliott v. Osborne*, 1 Cal. 396.

time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby.¹ An injunction order, and due service thereof on the party enjoined, do not operate to enlarge the time within which an act is required to be done by the party procuring the order.² Where the plaintiff in an injunction suit endeavored to entrap the defendant into a violation of the injunction, it was held that the plaintiff should be charged with the costs of an application for an attachment made by him.³ An attachment for disobeying an injunction may be granted;⁴ and the court may imprison for a contempt in violating an injunction.⁵

§ 4374. Dissolving Injunction—Notice of Motion to Dissolve.

Form No. 1070.

[TITLE.]

To

Please take notice that on [designate papers], the undersigned will move the court at, on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the injunction issued in this action be dissolved; and for such other or further relief as may be just.

[DATE.]

[SIGNATURE.]

§ 4375. Damage on Dissolution.—Defendant may recover damages, though the court had no jurisdiction.⁶ And the measure of damages is the value of the property.⁷ Fees of counsel are properly included where they are a direct loss.⁸ The fees of an attorney employed to resist injunction can not be recovered as damages, unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient.⁹ The plaintiff in an action on an injunction bond is not entitled to a judgment for damages for expenses incurred for attorneys' fees and in procuring testimony, unless he proves that he has actually paid the attorney and the expenses of procuring testimony.¹⁰ The usual bond being given, an order was made to show cause (August 29th) why an injunction should not issue. A restraining order in the

¹ Elliott v. Osborne, 1 Cal. 396.

² Id.

³ Sparkman v. Higgins, 2 Blatchf. 29.

⁴ Monroe v. Harkness, 1 Cranch C. C. 157.

⁵ Monroe v. Bradley, 1 Cranch C. C. 158; see Cal. Code C. P., secs. 1212, 1218, 1219.

⁶ Cumberland Coal Co. v. Hoffman

Steam Coal Co., 39 Barb. 16; S. C., 15 Abb. Pr. 78.

⁷ Barton v. Fisk, 30 N. Y. 166.

⁸ Ah Thaie v. Quan Wan, 3 Cal. 216; but see Taacks v. Schmidt, 18 Abb. Pr. 307.

⁹ Willson v. McEvoy, 25 Cal. 170.

¹⁰ Prader v. Grimm, 28 Cal. 11.

“mean time” was issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond: it was held that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th.¹ The form of an undertaking does not in terms provide for damages accruing after the preliminary order for an injunction has ceased to be operative, and the liability of sureties will not be extended by construction beyond the terms of the undertaking.²

§ 4376. **Defense in Action on Bond.**—In an action for damages on an undertaking given on suing out an injunction, the defendants can not object, by way of defense, that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance.³

§ 4377. **Dismissal of Suit.**—A judgment dismissing a suit in which a temporary injunction had been granted for want of prosecution amounts to a determination by the court that the injunction was improperly granted; and after such judgment, suit lies upon the injunction bond.⁴

§ 4378. **Effect of Answer.**—Upon a motion to dissolve an injunction, an averment in an answer not responsive to any allegation in the bill is not *per se* evidence against the complainant. The answer of the defendant, in order to be evidence in his favor, must respond to a fact averred in the bill, and not to a mere inference of law.⁵ If an answer denies the equities, it will be dissolved,⁶ but without prejudice.⁷ But it does not follow necessarily that the injunction should be dissolved in such case.⁸ And the supreme court will not interfere, except in case of abuse of discretion.⁹

§ 4379. **Effect of Appeal.**—An injunction is not dissolved or superseded by appeal taken.¹⁰ So an appeal from an order dissolving an injunction does not prolong the restraining order.¹¹

¹ Prader v. Grim, 13 Cal. 585.

² Webber v. Wilcox, 45 Cal. 302.

³ Cunningham v. Breed, 4 Cal. 384.

⁴ Dowling v. Polack, 18 Cal. 625.

⁵ Merritt v. Brinkerhoff, 17 Johns. 366; Payne v. Coles, 1 Mun. 373; Page's Ex'r v. Winston's Adm'r, 2 Id. 298; Robinson v. Cathcart, 2 Cranch C. C. 590; United States v. Parrott, 1 McAll. 271.

⁶ Hazard v. Hudson River Bridge Co., 27 How. Pr. 296.

⁷ Hazard v. Hudson River Bridge Co., 27 How. Pr. 296.

⁸ Carpenter v. Danforth, 19 Abb. Pr. 225; Bank of Monroe v. Schermerhorn, Clarke, 300.

⁹ Godey v. Godey, 39 Cal. 166; McCreery v. Brown, 42 Id. 457; Rogers v. Tenant, 45 Id. 186; see also Fuhn v. Weber, 38 Id. 637.

¹⁰ Merced Mining Co. v. Fremont, 7 Cal. 130.

¹¹ Hicks v. Michael, 15 Cal. 107.

§ 4380. **Effect of Dissolution.**—The dissolution of an injunction is a technical breach of the injunction bond.¹ Where an injunction has been dissolved, and afterward reinstated, and is still pending, no suit can be maintained on the injunction bond, as for a breach of it.²

§ 4381. **Grounds of Dissolution.**—If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.³ An injunction was dissolved on the grounds: 1. That the affidavit and papers on which it was granted were not legibly written; 2. That the injunction had not been served personally; 3. That the papers had not been filed.⁴ The grounds of the injunction can not be inquired into in suit upon an injunction bond. The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond.⁵

§ 4382. **Injunction Granted without Notice.**—If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same.⁶ The motion may be made: 1. Upon the complaint and affidavits, or in other words, the papers, whatever they may have been, upon which the injunction was granted; or 2. Upon papers upon which the injunction was granted, and affidavits on the part of defendant, with or without answer. If the defendant rests his motion upon the papers upon which the injunction is granted, the plaintiff can make no further showing, but must stand upon his complaint or his complaint and affidavits, as the case may be. If, however, the defendant makes a counter-showing by affidavit, with or without the answer, the plaintiff may meet it with a further showing on his part. If the defendant moves upon what he has prepared as his verified answer, he makes it an affidavit, in the sense of the statute, for all the purposes of his motion, and he can not deprive the plaintiff of his rights to reply by calling it an answer instead of an affidavit.⁷ It is no

¹ Stone v. Cason, 1 Or. 100.

² Bentley v. Joslin, Hempst. 218.

³ Cal. Code C. P., sec. 533.

⁴ Johnson v. Casey, 28 How. Pr. 492.

⁵ Dowling v. Polack, 18 Cal. 625.

⁶ Cal. Code C. P., sec. 532; but see Id., sec. 937; and Fremont v. Merced, 9 Cal. 19; Borland v. Thornton, 12 Id. 441.

⁷ Falkinburg v. Lucy, 35 Cal. 52.

ground for dissolving an injunction upon a motion made upon the complaint alone, if the facts alleged in the complaint are sufficient to entitle the plaintiff to an injunction.¹

§ 4383. **Judgment, Effect of.**—When suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and subsequently, at a final hearing, the court decides that such judgment was not fraudulent, but valid, it was held that the effect of such judgment is that plaintiff was not entitled to the restraining order.² Plaintiffs sue defendants for damages for their alleged trespasses upon a certain portion of quartz-mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted, the complaint averring the insolvency of defendants. The defendants deny all the allegations of the complaint, and claim ownership. The jury found, generally, “for defendants,” and judgment was rendered in their favor for costs. Defendants then moved to amend the judgment by adding thereto the words “and that the injunction heretofore granted be and the same is hereby dissolved,” which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer: it was held that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved.³

§ 4384. **Motion on Complaint and Answer.**—Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases.⁴ Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants: it was held that the injunction was properly dissolved, because the validity of defendants’ title should be judicially determined before its assertion be enjoined.⁵ Where the motion is made on complaint and

¹ Fuhn v. Weber, 38 Cal. 636.

² Heyman v. Landers, 12 Cal. 107.

³ Brennan v. Gaston, 17 Cal. 372.

⁴ Gardner v. Perkins, 9 Cal. 553;
Johnson v. Wide West M. Co., 22 Id.

479; Burnett v. Whitesides, 13 Id.

156; Real del Monte Co. v. Pond etc.

Co., 23 Id. 82.

⁵ Curtis v. Sutter, 15 Cal. 263.

answer, the answer will be treated as an affidavit, and the plaintiff is entitled to reply to the answer by affidavits.¹

§ 4385. **Motion, when to be Made.**—The motion to dissolve is limited to cases where the injunction is originally granted without notice.² If the injunction is granted upon notice, the remedy is by appeal.³

§ 4386. **Notice.**—Notice of a motion to dissolve an injunction must be given in a reasonable time before the motion is made, unless the cause has been set down for hearing of the motion.⁴ Under ordinary circumstances, one day's notice is too brief; but there is no fixed limit as to time.⁵

§ 4387. **New Trial, Effect of.**—Pendency of motion for a new trial does not operate as a suspension to an injunction.⁶ In an action to try the right to a mining claim, a preliminary injunction is granted on plaintiff's motion, and on appeal to the supreme court, a judgment in favor of plaintiff is reversed, and a new trial granted; this granting of a new trial does not entitle the defendant to a dissolution or modification of the injunction.⁷

§ 4388. **Reinstating.**—Where an injunction has been dissolved on the coming in of the answer denying the equity of the bill, and testimony has afterwards been taken and published tending to show the right of the complainant to relief, the injunction or application may be reinstated.⁸ When the judgment is reversed and the cause remanded for a new trial, it is returned to the lower court for a trial upon the issues, and it stands in the same attitude in all respects as before the former trial. If the plaintiffs were entitled to an injunction before the former trial, and the injunction was ordered, they were entitled to retain it upon the cause being remanded for a new trial.⁹

§ 4389. **Nonsuit, Effect of.**—When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial.¹⁰ If a prelimi-

¹ *Falkinburg v. Lucy*, 35 Cal. 52.

² *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 551; *Natoma W. and M. Co. v. Parker*, 16 Id. 83.

³ *Curtis v. Sutter*, 15 Cal. 265.

⁴ *Wilkins v. Jordan*, 3 Wash. C. C. 226. What notice is required, see *Burford v. Ringgold*, 1 Cranch C. C. 253; *Ramsay v. Wilson*, Id. 304; *Stoddert v. Waters*, Id. 483.

⁵ *Lawrence v. Bowman*, 1 McAll. 419. The Cal. Code C. P., sec. 532, uses the expression "reasonable notice." But see Id., sec. 1005, which provides what notice must be given of motions; and Id., sec. 937, which

provides that an order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified upon notice, in the manner in which other motions are made.

⁶ *Ortman v. Dixon*, 9 Cal. 23.

⁷ *Hess v. Winder*, 34 Cal. 270.

⁸ *Fanning v. Dunham*, 4 Johns. Ch. 36; *Travers v. Stafford*, 2 Ves. sen. 19; *Radford's Ex'r v. Innes' Ex'x*, 1 Hen. & M. 8; *Tucker v. Carpenter*, Hempst. 440.

⁹ *Hess v. Winder*, 34 Cal. 270.

¹⁰ *Harris v. McGregor*, 29 Cal. 124.

nary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the *remittitur* in the court below.¹

§ 4390. **Opposing Motion.**—If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the injunction was granted.² On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title.³

§ 4391. **Remedy of Defendant.**—An injunction bond, though given to all the obligees by name, and using no words directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each or all of the obligees from damages or injury.⁴ An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of court through malice, and without probable cause.⁵ If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond.⁶

§ 4392. **Reversal of Judgment.**—A reversal of judgment, which judgment awards the plaintiff possession of a tract of land, and perpetually enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the appellate court.⁷

§ 4393. **Revival of Injunction.**—The court below may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of.⁸

§ 4394. **Right to Move.**—The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to section 118 of the practice act.⁹ The privilege of moving for a dissolution of an injunction upon the filing of an answer is limited to cases where the injunction is originally granted without notice. Where the injunction is

¹ Harris v. McGregor, 29 Cal. 124.

² Code C. P., sec. 532.

³ Hicks v. Michael, 15 Cal. 107.

⁴ Summers v. Farish, 10 Cal. 347.

⁵ Robinson v. Kellum, 6 Cal. 399.

⁶ Id.

⁷ McGarahan v. Maxwell, 28 Cal. 84.

⁸ Hicks v. Michael, 15 Cal. 107; Creanor v. Nelson, 23 Id. 464.

⁹ Cal. Code C. P., sec. 532; Natomia Water and Mining Co. v. Parker, 16 Cal. 83.

granted on a rule to show cause, it can not be dissolved until the final hearing, unless the right to apply for dissolution on filing the answer be expressly reserved. An injunction granted upon an order to show cause, and after a full hearing on the merits, can not be dissolved on motion before the final hearing. The only remedy is to appeal from the order granting the injunction.¹

§ 4395. **Street Assessment.**—Where assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff interposing in the outset to prevent it, and he then filed an injunction bill to stay the sale of his land by virtue of an ordinance of the city, for the purpose of avoiding the payment of his portion of the assessment, it was held that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessments, leaving him after the sale to the technical rights which he set up, by reason, as he claimed, of some irregularity in the mode of making the assessment.²

§ 4396. **When Dissolved.**—Where an injunction is granted until further answer and further order, which is the usual form, it is never dissolved until the answer comes in, even though the defendant should live abroad.³ If there are several defendants, the court will not in general dissolve the injunction until all have answered.⁴

§ 4397. **Order Dissolving Injunction.**

Form No. 1071.

[TITLE.]

On reading and filing answer of defendant, and on motion of G. H., counsel for the defendant, and after hearing E. F., counsel for plaintiff, in opposition:

It is ordered that the injunction granted on the day of, 18..., against the above-named C. D., be vacated and dissolved,

J. C.,

Judge of County.

¹ Cal. Code C. P., sec. 532; *Natoma Water and Mining Co. v. Parker*, 16 Cal. 83.

² *Weber v. The City of San Francisco*, 1 Cal. 455.

³ *Read v. Consequa*, 4 Wash. C. C. 174.

⁴ *Robinson v. Cathcart*, 2 Cranch

C. C. 590. Where an injunction will be dissolved upon the coming in of an answer denying positively the equities of the bill, see *Orr v. Merrill*, 1 Woodb. & M. 376; *Orr v. Littlefield*, Id. 13; *United States v. Parrott*, 1 McAll. 271.

§ 4398. Order Confirming Report as to Damages.*Form No. 1072.*

[TITLE.]

On reading and filing the annexed notice of motion and affidavit and certificate, and the referee's report, and the evidence on which the same was founded, and on motion of G. H. for the defendants, and after hearing E. F. for plaintiffs, and for L. M. and N. O. (sureties), in opposition:

It is ordered that the said report of the referee herein be, and the same is hereby, in all respects confirmed, with dollars of costs of this motion.

§ 4399. Injunction Dissolved and Action Dismissed.*Form No. 1073.*

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the court upon the issues joined between the parties, on consideration whereof the court does find that the said defendant [here state the finding of the court on the issues presented in the pleadings] was not guilty of the waste and destruction in manner and form as the said plaintiff hath in his said complaint declared against him, or in any manner, or at all. It is therefore considered that the injunction heretofore granted in this action be, and the same is hereby dissolved; and it is further considered that the said defendant recover against the said plaintiff his costs in and about his suit, in this behalf expended, taxed to be dollars.

§ 4400. Injunction Made Perpetual.*Form No. 1074.*

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the court, upon the issues joined between the parties; on consideration whereof, the court do find that the said defendant was guilty of the waste and destruction, in manner and form as the said plaintiff hath in his said complaint alleged against him.

It is therefore ordered and adjudged that the injunction heretofore granted in this action be, and the same is hereby, made perpetual, and the said defendant is hereby perpetually enjoined from [here state the act or acts complained of, with particularity, and from the doing of which the defendant is to be enjoined]; and it is further considered that the said plaintiff recover against the said defendant his costs in and about his suit, in this behalf expended, taxed to be dollars.

PART EIGHTH.

PROCEEDINGS COLLATERAL AND INCIDENTAL TO ACTIONS.

CHAPTER I.

NOTICES OF MOTION, AFFIDAVITS, AND ORDERS IN GENERAL

§ 4401. **Motions and Notices in General.**—It is prescribed by the statute of California that “every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.”¹ It may be defined to be the judgment or conclusion of the court, upon any motion or proceeding; and includes cases where affirmative relief is granted, and cases where relief is denied.² The effect of an order, general in its terms at its close, may be determined or ascertained by reference to the motion upon which it was made, when such motion is recited in the order at its commencement.³ In practice, a motion is an oral argument to the court, showing why a certain order should be made; while a notice is a written information given to the opposite party, that at a certain time and place the party giving the same will move the court for a certain order, stating what. It is also necessary for the moving party to state in such notice the grounds or particular points upon which the motion will be made;⁴ and also upon what the motion will be founded, as⁵ upon affidavits, papers on file, etc. It is also provided by our statute that motions must be made in the county in which the action is brought, or in an adjoining county within the same district.⁶ Thus the practitioner may readily know where the motion must be made. The title of the action must also be

¹ Cal. Code C. P., sec. 1003.

² McKinley v. Tuttle, 34 Cal. 248.

³ Gilman v. Contra Costa Co., 8 Cal.

⁴ Freeborn v. Glazer, 10 Cal. 337.

57.

⁵ Cal. Code C. P., sec. 1004.

correctly given, with the date and hour of the day when it will be made, and the particular place—*e. g.*, the city hall, courthouse, etc. The true practice is to be very specific in all questions of time, place, and object of the motion. There are certain motions which are termed contested motions, and certain others termed *ex parte* motions. The former always require previous notice, the latter never. An order made without notice may be vacated or modified without notice.¹ When notice is required it must be given in writing five days before the hearing, if the court is held in the same district with both parties; otherwise ten days, except when served by mail.² This is the statutory rule, but the court, in the exercise of a sound discretion, may extend or even shorten the time. These are questions which arise in the course of the action, and only relate to the practice, and, so far as allowable by the statute, are generally regulated by the rules of each particular court, a full knowledge of which is too frequently not regarded by the profession as essential. The question of service of notices, where important rights are to be affected, must be carefully considered. The statute must be strictly followed to insure due and legal service, as nothing will be left to implication. Unless the statute be strictly followed, the court will not have acquired jurisdiction to make the order asked for, and the entire proceedings will be illegal. Frequently notice is waived by stipulation of attorneys not in writing. This may be sufficient among honorable practitioners, but it is not the true practice, as it sometimes fails of its object, whereas, if the directions of the statute be strictly followed, no misunderstanding can arise.

§ 4402. Form of Notice.

Form No. 1075.

[TITLE.]

To, attorney for

Please take notice that I will move this honorable court, at the court-room, in the city hall, on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order [state the substance of order], and for such other and further order as may be just. Said motion will be made upon the ground that [state particularly the grounds upon which the motion is founded], and will be supported by the affidavit, a copy of which is herewith served upon you, and the pleadings, papers, and records in the above cause.

[DATE.]

[SIGNATURE.]

Attorney for

¹ Cal. Code C. P., sec. 937; *Coburn v. Pac. L. & M. Co.*, 46 Cal. 31.

² Cal. Code C. P., sec. 1005.

§ 4403. **Appearance.**—Service of notice of appearance must antedate or be contemporaneous with the service of all other notices and papers.¹

§ 4404. **Computation of Time.**—The time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.² When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown by the court in which the action is pending, or the judge thereof, or in the absence of such judge from the county in which the action is pending by the county judge; but such extension shall not exceed thirty days without the consent of the adverse party.³

§ 4405. **Consolidation of Actions.**—Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.⁴ The supreme court will not consolidate suits brought upon distinct causes of action.⁵

§ 4406. **Construction.**—If there is any ambiguity in the terms of a notice rendering its meaning doubtful, the construction must be most strongly against the party giving the notice.⁶

§ 4407. **Discretion.**—All the proceedings in a case are supposed to be within the control of the court while they are in paper, and before a jury is sworn or judgment given. Therefore orders may be revised, and such as in the judgment of the court may have been irregular or improperly made may be set aside.⁷ A question whether a party had a right to proceed summarily on motion to vacate a decree in the circuit court is merely one of practice, to be governed by the rules prescribed by the supreme court, and the established principle and usage of a court of chancery.⁸

§ 4408. **Due Notice.**—Due notice can not be defined. Circumstances must control each case.⁹ Notice to a deputy marshal is equivalent to notice to the marshal himself.¹⁰

¹ Steinbach v. Leese, 27 Cal. 297.

² Cal. Code C. P., sec. 12.

³ Id., sec. 1054.

⁴ Cal. Code C. P., sec. 1048; N. Y. 303. Code, sec. 817.

⁵ Wallace v. Eldredge (No. 2), 27 Cal. 498.

⁶ Carpentier v. Thurston, 30 Cal. 123.

⁷ Breedlove v. Nicolet, 7 Pet. 413.

⁸ Wiggins v. Gray, 24 How. U. S.

⁹ Lawrence v. Bowman, 1 McAll. 419.

¹⁰ United States v. Bank of Arkansas, Hempst. 460.

§ 4409. **Notice Essential.**—Special motions, unlike those granted of course, require allowance by the judge, and previous notice to the adverse party.¹ Upon application by counsel for the plaintiff, a day was assigned to argue the question of the jurisdiction of the court to proceed in the cause, upon the condition that notice should be given to the defendant, to enable him to employ counsel in the interim, as the court would not feel bound by its decision in an *ex parte* argument if the defendant should desire to have the question again argued.² Previous notice of a motion for the appointment of a receiver is unnecessary when the parties to be affected are in court by counsel.³ A motion to produce a paper in the possession of the plaintiff, which is necessary to enable the plaintiff to plead, may be granted, in the discretion of the court, although no notice has been given; otherwise when possession of a paper is desired to be used in evidence.⁴ The above references are more especially applicable to the practice in the United States courts.⁵ It is prescribed by the code of civil procedure of California that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.⁶ Notices must be in writing.⁷

§ 4410. **Notice to Attorney.**—It is the duty of an attorney to communicate to his client whatever information he acquires in relation to the subject-matter of the suit, and he will be presumed to have performed his duty, and notice to him is constructive notice to his client.⁸ Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record.⁹ Notice of motion for new trial must be given by the attorney of record.¹⁰

§ 4411. **Order of Court—Entry Nunc pro Tunc.**—A court has no power, after the adjournment of a term, to direct the clerk to enter in the minutes, *nunc pro tunc*, an order alleged

¹ United States v. Parrott, 1 McAll. 447.

² New Jersey v. New York, 3 Pet. 461.

³ McLean v. Lafayette Bank, 3 McLean, 503.

⁴ Bronson v. Kensey, 3 McLean, 180.

⁵ See Cal. Code C. P., secs. 449 and 1938.

⁶ Cal. Code C. P., sec. 1014.

⁷ Cal. Code C. P., sec. 1010.

⁸ Bierce v. Red Bluff Hotel Company, 31 Cal. 160.

⁹ Grant v. White, 6 Cal. 55.

¹⁰ Prescott v. Salthouse, Cal. Sup. Ct., July term, 1878; and must be served upon the attorney of record: Frost v. Meetz, Cal. Sup. Ct., July term, 1877; see also Cal. Code C. P., sec. 1015.

to have been made at the adjourned term, when there is nothing in the record to show that such order was made.¹

§ 4412. **Order to Show Cause.**—An order to show cause why a judgment should not be vacated must be served, or it will be error to vacate the judgment on such order.² An order to show cause why a commission should not issue to take a deposition is, if served upon the adverse party, a sufficient notice to him to justify the issuance.³

§ 4413. **Order, when Granted.**—Motion for any rule or order is not allowed when the court is equally divided. If an affirmative decision be indispensable, the case stops and the parties go out of court; otherwise the case stands as if no motion had been made.⁴ A motion made at one term not being decided nor continued, the court will order a continuance *nunc pro tunc*, and the defendant will not be required to take up the motion at that term, as he had the right to suppose that it was abandoned.⁵

§ 4414. **Order in Insolvent Proceedings.**—An order of the county judge in insolvent proceedings, made under sections 5 and 8 of the California insolvent act, which directs the clerk to issue an “order for the creditors to appear * * * and show cause why the insolvent should not be discharged from his debts, in pursuance of the insolvent laws, and likewise make an assignment of his estate for the benefit of his creditors,” is a substantial compliance with said act.⁶

§ 4415. **Restitution of Rights after Reversal of Judgment.**—Where the judgment of a lower court is reversed or modified on appeal, although the supreme court may restore the property or rights lost by the erroneous judgment or order, this does not exclude the lower court from exercising the same power. The party aggrieved may proceed in the lower court by motion, against which there seems to be no statute of limitations where there is no unreasonable delay.⁷

§ 4416. **Rule to Show Cause.**—It has been held by the supreme court of the United States that the rule on the judge of a district court to show cause is a rule upon the judge to explain his conduct; and furnishes a case by implication which makes it proper that the supreme court should know the reason for his decision. The rule ought not to be granted when the record does not show mistake, misconduct, or omission of duty

¹ Hegeler v. Henckell, 27 Cal. 491.

² Vallejo v. Green, 16 Cal. 160.

³ Dambmann v. White, 48 Id. 439.

⁴ Goddard v. Coffin, Daveis, 381.

⁵ Hurd v. Williams, 4 McLean, 239.

⁶ Flint v. Wilson, 36 Cal. 24.

⁷ Reynolds v. Harris, 14 Cal. 667; see also Pico v. Cuyas, 48 Id. 639.

on the part of the court, unless a *prima facie* case be made out by affidavit.¹ Malicious conduct of an officer in executing process can not be reached by motion.² But when a sheriff, having received an execution on which costs are due, fails to make them when practicable, he becomes responsible, and may be reached by motion. An order of the client or attorney can not change this liability.³

§ 4417. **Service, how Made.**—Service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows: 1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post-office, directed to such attorney; 2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the post-office, directed to such party.⁴ An affidavit which states that affiant "left a true copy at the office of C. & B., the attorneys for the defendant," is insufficient.⁵ In all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.⁶ Reading an order of court to the party to be served is not a compliance with a statute which requires that such party shall have reasonable notice in writing of the order.⁷ A notice can not lawfully be served on Sunday.⁸

§ 4418. **Service by Mail.**—Service by mail may be made where the person making the service and the person on whom it is to be made reside or have their offices in different places,

¹ Postmaster-general v. Tugg, 11 Pet. 173.

² Smith v. Miles, Hempst. 34.

³ Lewis v. Hamilton, Id. 21.

⁴ California Code of Civil Procedure, sec. 1011.

⁵ Gallardo v. A. & P. T. Co., 49 Cal. 510.

⁶ Cal. Code C. P., sec. 1015.

⁷ Hart v. Gray, 3 Sumn. 339.

⁸ Chesapeake & Ohio Canal Co. v. Bradley, 4 Cranch C. C. 193.

between which there is a regular communication by mail.¹ In such case, the notice or other paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address, such extension not to exceed ninety days in all.² Distance is a question of fact to be determined by proof.³ A party relying upon a service of notice by mail must show strict compliance with the statute.⁴

§ 4419. **Service on Non-residents.**—When a plaintiff or defendant who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him.⁵ But the absence of a purchaser at sheriff's sale, from the state, does not excuse service on him of notice of a motion to set aside the execution and sale.⁶

§ 4420. **Title of Action.**—An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.⁷

§ 4421. **Transfer of Motions and Orders.**—When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.⁸

§ 4422. **Affidavit Denying Genuineness and Due Execution of Written Instrument in a Pleading.**

Form No. 1076.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled cause.

II. The note [or bill, or other written instrument], set forth

¹ Cal. Code C. P., sec. 1012.

⁵ Cal. Code C. P., sec. 1015.

² Id., sec. 1013; see also Id., sec. 1005.

⁶ Eckstein v. Calderwood, 34 Cal. 658.

³ Neely v. Naglee, 23 Cal. 152.

⁷ Cal. Code C. P., sec. 1046; Mills v. Dunlap, 3 Cal. 94.

⁴ People v. Alameda Turnpike Co., 30 Cal. 182.

⁸ Cal. Code C. P., sec. 1006.

in the answer of the defendant herein, is not my note [or was not made or indorsed or accepted by me, or otherwise denying the making or executing of the instrument].

[JURAT.]

[SIGNATURE.]

§ 4423. **Denial of Execution.**—When a copy of a written instrument is contained in an answer or annexed thereto, to avoid an admission of its genuineness and due execution, the plaintiff must file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.¹ But the execution of such instrument is not deemed admitted by failure to deny the same on oath if the party desiring to controvert the same is, upon demand, refused an inspection of the original.²

§ 4424. **Notice of Motion for Order Allowing Party to Enter on Land and Make Survey, etc., in Actions concerning Real Property.**

Form No. 1077.

[TITLE.]

To G. H., attorney for defendant.

Please take notice that A. B., the plaintiff herein, will, on the day of, 18.., at the hour of o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of said court in the city hall, in the city of, move said court to grant the plaintiff herein an order allowing him the right to enter upon the property in controversy in this action, hereinafter described, and to make survey and measurement thereof for the purpose of [state particularly the object for which the survey is desired]. Said motion will be made upon the affidavit herewith served upon you, and upon the pleadings, records, and papers in the cause. The property to be affected by such order is described as follows [description].

[DATE.]

[SIGNATURE.]

§ 4025. **Actions for Real Property.**—The court in which an action is pending for the recovery of real property may, or a judge thereof, or a county judge, may, on motion upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts thereon, for the purpose of the action.³

§ 4426. **Service of Order.**—The order must describe the property, and a copy thereof must be served on the owner or

¹ Cal. Code C. P., sec. 448.

² Id., sec. 449. As to order for an inspection, see Id., sec. 1000.

³ Cal. Code C. P., sec. 742.

occupant; and thereupon such party may enter upon the property with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.¹

§ 4427. Order Allowing Party to Enter for Survey.

Form No. 1078.

[TITLE.]

The motion for an order allowing the plaintiff to enter upon the lands in controversy in this action, and hereinafter described, coming on to be heard this day, on the affidavits introduced by the respective parties, and the pleadings, records, and papers in the cause, E. F. appearing as attorney for the plaintiff, and G. H. appearing for the defendant and opposing said motion, and it appearing to the court that good cause exists therefor, it is hereby ordered that the plaintiff herein be and he is hereby allowed to enter into and upon the land hereinafter described, with the necessary surveyors and their assistants, and to make survey and measurement thereof, for the purpose of [state purpose]. The land upon which plaintiff is so allowed to enter is described as follows [description].

[DATE.]

[SIGNATURE OF JUDGE.]

§ 4428. Notice Requiring Security for Costs.

Form No. 1079.

[TITLE.]

To, attorney for plaintiff.

Please take notice that the defendant C. D. requires security on the part of the plaintiff A. B., for the costs and charges which may be awarded against said plaintiff in this action, in accordance with the statute in such case made and provided, on the ground that said plaintiff is a non-resident of this state [or a foreign corporation].

[DATE.]

[SIGNATURE.]

§ 4429. Dismissal of Action.—After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking has been filed, the court or judge may order the action to be dismissed.² Where notice requiring security for costs was given, unaccompanied by an order staying proceedings, and judgment was rendered for defendant, and plaintiff appealed, it was held that the motion to dismiss the action came too late after judgment, and that the motion to dismiss the appeal must be denied, the undertaking on appeal being sufficient.³

¹ Cal. Code C. P., sec. 743.

² Cal. Code C. P., sec. 1037.

³ Comstock v. Clemens, 19 Cal. 77.

The foregoing decision seems to take it for granted that an order for a stay of proceedings would be proper, but whether it is necessary—*quære*.¹

§ 4430. **From Whom Required.**—Security for costs and charges which may be awarded against the plaintiff, not exceeding three hundred dollars, may be required by the defendant when the plaintiff resides out of the state or is a foreign corporation.² In New York, a plaintiff who is a non-resident at the time of commencing his action is not excused from filing security for costs by the fact that he afterwards became a resident.³ The defendant has the right to security for costs only, where all the plaintiffs are non-residents.⁴ A foreign government suing in a court of the state may be required to file security for costs.⁵ The principal office or place of business of a corporation may be said to be its residence.⁶ In California, a new or additional undertaking may be ordered, upon proof that the original undertaking is insufficient.⁷ It was formerly held otherwise in New York.⁸

CHAPTER II.

ITEMS OF ACCOUNT.

§ 4431. Demand for Bill of Items.

Form No. 1080.

[TITLE.]

To E. F., attorney for plaintiff.

Please take notice that the defendant hereby demands a bill of the particular items of the account mentioned in the complaint of plaintiff herein.

[DATE.]

[SIGNATURE.]

§ 4432. Copy of Account.

Form No. 1081.

[TITLE.]

[Here set forth the account referred to in the pleading.]

To, attorney.

Please take notice that the above is a copy of the account demanded by you [or referred to in the complaint or answer] in this action.

[DATE.]

[SIGNATURE.]

¹ See Cal. Code C. P., sec. 1036.

² Cal. Code C. P., sec. 1036.

³ Ambler v. Ambler, 8 Abb. Pr. 340.

⁴ Ten Broeck v. Reynolds, 13 How. Pr. 462.

⁵ Republic of Mexico v. Arrangois, 3 Abb. Pr. 470.

⁶ Jenkins v. Cal. Stage Co., 22 Cal. 537.

⁷ California Code of Civil Procedure, sec. 1036.

⁸ Hartford Quarry Co. v. Pendleton, 4 Abb. Pr. 460.

§ 4433. **Demand for Items.**—Within five days after a demand thereof in writing a copy of the account shall be delivered to the adverse party, or evidence thereof can not be given, and if too general or defective a further account may be ordered.¹ A complaint for money due for the use and occupation of land does not present a claim upon which a bill of particulars can be required.²

§ 4434. **Items Set Forth.**—The items of the account furnished must be set forth with as much particularity as the nature of the case admits of.³ A bill of particulars is sufficiently specific if it apprises the opposite party of the evidence to be offered.⁴ If the bill is too general, the party receiving it should obtain an order for further particulars. If he does not, he can not proceed as if no bill was rendered.⁵ Where a party has obtained a further bill of particulars under an order of the court, if he intends to object to any evidence upon the subject, he should have obtained, previous to the trial, an order excluding such evidence.⁶

§ 4435. **What Need not be Set Forth.**—A party is not bound to furnish particulars of set-offs with which he volunteers to credit the opposite party;⁷ nor when a knowledge of the facts on which a party's claim rests is more with the defendant than the plaintiff.⁸ Where the complaint *in hæc verba* set forth the bill of sale, it was held to remedy a defect in the allegation of the quantity of goods sold. A party must be presumed to know what was intended by his own account.⁹

§ 4436. **Order for a Further Bill of Particulars.**

Form No. 1082.

[TITLE.]

On good cause shown, let the plaintiff's attorney deliver to the defendant's attorney a further account in writing of the particulars of the plaintiff's demand for which this action is brought, within days, specifying the dates of the said several items [or other matters in which the bill is deficient].

[DATE.]

[SIGNATURE.]

§ 4437. **Order.**—An order of the court for a further account should specify the particulars in reference to which a further specification is required.¹⁰

¹ Cal. Code C. P., sec. 454.

² Moore v. Bates, 46 Cal. 29.

³ Bagley's Pr. 204; Connor v. Hutchinson, 17 Cal. 280; Kellogg v. Paine, 8 How. Pr. 329.

⁴ Smith v. Hicks, 5 Wend. 48.

⁵ Prov. Tool Co. v. Prader, 32 Cal. 634.

⁶ Connor v. Hutchinson, 18 Cal. 279.

⁷ Williams v. Shaw, 4 Abb. Pr. 209; Giles v. Betz, 15 Id. 285.

⁸ Young v. De Mott, 1 Barb. 30.

⁹ Cochran v. Goodinan, 3 Cal. 244.

¹⁰ Connor v. Hutchinson, 17 Cal. 280; Kellogg v. Paine, 8 How. Pr. 329.

§ 4438. **Order for an Inspection, etc., of Books.**—Any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession or his control containing evidence relating to the merits of the action, or the defense therein.¹ If compliance with the order be refused, the entries, document, or paper may be excluded as evidence; or if wanted as evidence by the party applying, the court may direct the jury to presume them to be such as he alleges them to be; and punish the party refusing for contempt.²

CHAPTER III

ENLARGING TIME TO PLEAD.

§ 4439. **In General.**—The court may, in furtherance of justice, and on such terms as may be proper, enlarge the time for answer or demurrer;³ or may allow an answer to be made after the time limited by this code.⁴ The party must take the initiatory steps to obtain relief before the expiration of the term at which final judgment is rendered in all cases except those mentioned in the statute.⁵ Where a demurrer to a complaint is overruled, and an application is subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the court must in a great degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice.⁶ In such case, where no application was made to the court for leave to answer, and no meritorious defense was asserted, this court will not reverse the judgment and open the case for another trial.⁷

§ 4440. **Affidavit on Motion to Enlarge Time to Plead.**

Form No. 1083.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

¹ Cal. Code C. P., sec. 1000.

² Id. See chapter on this subject, *post.* 338.

³ Cal. Code C. P., sec. 473.

⁴ Id.; see also Id., sec. 1054.

⁵ Casement v. Ringgold, 28 Cal.

⁶ Thornton v. Borland, 12 Cal. 438.

⁷ Id.

I. I am the defendant in the above-entitled action.

II. I have fully and fairly stated the case in this cause to G. H., my counsel therein, who resides at [or at No., street, in the city of]; and I have a good and substantial defense, on the merits, to said action, as I am advised by my said counsel, after such statement so made to him as aforesaid, and verily believe.

III. [State excuse for desiring enlargement of time.]

IV. That the complaint was served on the of 18.., and the time to answer will expire on theday of, that no extension of such time has been had, and days further time are necessary to prepare and file said answer.

[JURAT.]

[SIGNATURE.]

§ 4441. Order Enlarging Time to Plead.

Form No. 1084.

On the annexed affidavit of C. D., and on motion of G. H., his attorney, it is ordered that said defendant have days further time from and after the day of 18.., to answer the complaint of plaintiff herein.

[DATE.]

[SIGNATURE OF JUDGE.]

CHAPTER IV.

AMENDMENTS.

§ 4442. In General.—In California, as in most states having codes of civil procedure, it is provided that courts must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties.¹ If the error is such that it may not be disregarded, the question whether it may be cured by amendment is always important, and sometimes difficult. Under the restrictions or limitations named in the statute, the courts have power to amend its process, the pleadings in the cause, and the proceedings therein, including orders and the judgment or decree. The granting of amendments is largely in the discretion of the court, and must depend upon the circumstances of the particular case, and the consideration whether it is in furtherance of justice.

§ 4443. Amendment of Process.—The code of civil procedure of California provides that “every court has power to amend and control its process and orders so as to make them

¹Cal. Code C. P., sec. 475; N. Y. Code, sec. 723.

conformable to law and justice.”¹ In New York the court may upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, amend any process, pleading, or other proceeding, in certain specified particulars.² Similar provisions are found in all the codes. But a summons is not amendable of course. It can only be amended by permission of the court.³ The particulars in which the court may authorize an amendment of process are numerous. A summons may be amended by inserting a notice of the cause of action.⁴ Leave was granted to amend a summons by increasing the amount, although as to the increased amount the effect was to deprive the defendant of the benefit of the statute of limitations.⁵ And where by setting aside a summons and complaint as irregular the plaintiff would have been barred by the statute of limitations, the court, instead of setting the proceedings aside, permitted an amendment on payment of costs.⁶ An amendment of summons by referring to the complaint as annexed when it was omitted may be allowed.⁷ All mistakes may be corrected by amendment under section 723 of the New York code. Section 473 of the California code of civil procedure is also very broad, though not so comprehensive as section 128, above quoted.

§ 4444. **Amendment of Pleadings.**—Any pleading may be amended once by the party, of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter to answer or demur to the amended pleading.⁸ Except as provided in these sections, leave to amend must be obtained. An amendment must be substantial, not merely colorable.⁹ Adding a verification to a complaint is not an amendment.¹⁰ And it will not be allowed where the original pleading was not verified. Amendments can only be allowed where there is a defect in the parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case.¹¹ Courts should allow amendments with great liberality at any time before trial, if the

¹ Sec. 128, subd. 8.

² See Code [1877], sec. 723.

³ *McCrane v. Moulton*, 3 Sandf. 736; *Walkenshaw v. Perzell*, 32 How. Pr. 310; S. C., 5 Rob. 648.

⁴ *Polack v. Hunt*, 2 Cal. 193.

⁵ *Deane v. O'Brien*, 13 Abb. Pr. 11; see also *Sluyter v. Smith*, 2 Bosw. 673.

⁶ *Weir v. Slocum*, 3 How. Pr. 397.

⁷ *Foster v. Wood*, 1 Abb. Pr., N. S., 150; S. C., 30 How. Pr. 284.

⁸ Cal. Code C. P., sec. 472; N. Y. Code, sec. 542.

⁹ *Snyder v. White*, 6 How. Pr. 321.

¹⁰ *George v. McAvoy*, 6 Id. 200.

¹¹ *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Story's Eq. Pl.* 884; *Shields v. Barrow*, 17 How. U. S. 130.

amendment is essential to a fair trial on the legal merits of the case, and does not occasion injurious delays.¹ Amendments are to be allowed or denied in furtherance of substantial justice, that is, such justice as the law administers when correctly applied.² Motions to amend are not to be granted as matter of course, but only when good cause is shown therefor.³

§ 4445. **When Allowable.**—Amendments will be allowed to any extent, provided no new cause of action in substance is added;⁴ as amendments substantially changing the claim or defense can not properly be granted at any time;⁵ though the court should not allow a new and wholly different case to be made.⁶ A court of chancery should rarely if ever permit amendments so changing the character of the pleadings as to make substantially a new case after the cause has been set for hearing, much less after it has been tried.⁷ Plaintiff may amend by a new count, introductive of a new cause of action, if it correspond in character with the original count in a kindred cause, admitting the same pleading and defense, and which might have been included in the original declaration.⁸ For the purpose of determining whether new matter is entirely foreign to the cause of action in the original complaint, the original complaint must be liberally construed.⁹ Plaintiff can not amend so as to change an action *ex contractu* to one *ex delicto*;¹⁰ nor to change the mode of trial;¹¹ nor can the plaintiff in ejectment set up title acquired after commencement of suit.¹² So, also, facts which occur subsequent to filing the complaint, and which change the liabilities of the defendants, can not be incorporated by amendment.¹³

An amendment may strike out a cause of action.¹⁴ An

¹ *McMillan v. Dana*, 18 Cal. 349; *Kirstein v. Madden*, 38 Id. 163.

² *Stringer v. Davis*, 30 Cal. 321.

³ *Hayden v. Hayden*, 46 Cal. 333.

⁴ *Hollister v. Livingston*, 9 How. Pr. 140.

⁵ *Bailey v. Johnson*, 1 Daly, 61; *Woodruff v. Dickie*, 31 How. Pr. 164; *Ransom v. Wetmore*, 39 Barb. 104; *Whitcomb v. Hungerford*, 42 Id. 177. That an amendment, made of course, may add a new cause of action, see *Mason v. Whitely*, 4 Duer, 611; 1 Abb. Pr. 85; and see *Wyman v. Redmond*, 18 How. Pr. 272; *Macqueen v. Babcock*, 13 Abb. Pr. 268; but see *Woodruff v. Dickie*, 5 Rob. 619.

⁶ *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Story's Eq. Pl.* 884;

Shields v. Barrow, 17 How. U. S. 130; *Schofield v. Fitzhugh*, 1 Cranch C. C. 108; *The Harmony*, 1 Gall. 123.

⁷ *Walden v. Bodley*, 14 Pet. 156.

⁸ *Tiernan v. Woodruff*, 5 McLean, 135.

⁹ *Nevada Co. and Sac. Canal Co. v. Kidd*, 28 Cal. 673.

¹⁰ 1 *Van Santv. Pl.* 768; *Ramirez v. Murray*, 5 Cal. 222; *Lane v. Beany*, 19 Barb. 51; 1 Abb. Pr. 65.

¹¹ *McCarty v. Edwards*, 24 How. Pr. 236; *Craig v. Hyde*, Id. 313.

¹² *Smith v. Billet*, 15 Cal. 26.

¹³ *Van Maren v. Johnson*, 15 Cal. 308; *Woodruff v. Dickie*, 31 How. Pr. 164; *Sheldon v. Adams*, 18 Abb. Pr. 405; S. C., 41 Barb. 54; S. C., 27 How. Pr. 179.

¹⁴ *Watson v. Rushmore*, 15 Abb. Pr. 51.

amended pleading can not set up matter which occurred after suit brought.¹ It must be presented by supplemental pleading. In an action for a fraudulent sale of a mine, an amendment striking out the offer to return the deed does not change the issues tendered.² A plaintiff may amend by filing a more full and particular account.³ The complaint may be amended, within the time limited, by setting forth a new cause of action, and is not restricted to a cause of action of the same class as that in the original complaint, though all the causes set forth in the amended complaint must be of the same class and of a class to which the summons is appropriate.⁴ In California, as a rule, the courts are extremely liberal as to amendments.

§ 4446. **Amendments of Course.**—Amendments of course may be made, without costs to either party, to a pleading at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon.⁵ But a party shall not so amend more than once. If the defendant demurs to the complaint, it is an error for the court to refuse the plaintiff leave to amend his complaint before the decision on the demurrer;⁶ but he can not amend a second time without leave of the court.⁷ After demurrer, and before argument and submission of the issue thereon, either party may amend a pleading, by filing the same as amended, and serving a copy on the adverse party or his attorney, who has ten days to answer or demur thereto.⁸

The right to amend as of course is absolute, and can not be interfered with, unless the amendment is merely colorable, and made for purposes of delay only.⁹ And though absolute, it may be waived, either by express notice or noticing cause for trial.¹⁰ A party may amend of course where the same amendment would be allowed at the trial.¹¹ An amendment that would have the effect of changing the parties to the action will not be al-

¹ *Hornfager v. Hornfager*, 6 How. Pr. 13; *Lampson v. McQueen*, 15 Id. 345.

² *Ahrens v. Adler*, 33 Cal. 608.

³ *Estate of Hidden*, 23 Cal. 362; *Valencia v. Couch*, 32 Id. 339. How far the discretion of the court in allowing amendments so as to change the form of action is restricted by the code, discussed in *Brown v. Babcock*, 3 How. Pr. 305; *Spalding v. Spalding*, 3 Id. 297; *Forniss v. Brown*, 8 Id. 59.

⁴ *Brown v. Leigh*, 49 N. Y. 78; S. C., 12 Abb. Pr., N. S., 193.

⁵ Cal. Code C. P., sec. 472; N. Y. Code, sec. 542; 1 Van Santv. Pl. 792; 1 Whitt. Pr. 611; 1 Barb. Ch. Pl.

206, 25; *Allen v. Marshall*, 34 Cal. 165. *Lord v. Hopkins*, 30 Cal. 76; *Barber v. Reynolds*, 33 Cal. 407.

⁶ *Lord v. Hopkins*, 30 Cal. 76.

⁷ *Sands v. Calkins*, 30 How. Pr. 1; *Jeroliman v. Cohen*, 1 Duer, 631; *White v. Mayor of N. Y.*, 5 Abb. Pr. 322; S. C., 14 How. Pr. 495.

⁸ Cal. Code C. P., sec. 472.

⁹ *Griffin v. Cohen*, 8 How. Pr. 451; *Rogers v. Rathbun*, Id. 466; *Thompson v. Minford*, 11 Id. 273; *Spencer v. Tooker*, 12 Abb. Pr. 353.

¹⁰ 1 Van Santv. Pl. 796; *Cusson v. Whalon*, 5 How. Pr. 305.

¹¹ *Getty v. Hudson River R. R. Co.*, 6 How. Pr. 269.

lowed unless there is something in the record to amend by.¹ Nor, without amending the summons, can the names of additional defendants be introduced.² And a summons can not be amended without leave of court.³ An amendment of course will not be allowed which sets up a different claim. By claim is meant the particular relief sought; though the cause of action, that is the statement of facts, may be amended.⁴ But an amendment could be allowed by inserting a count for goods sold and delivered without terms, and allowing the trial to proceed; such is not a case changing substantially the claim.⁵ And "other allegations material to the case" may be introduced.⁶

§ 4447. **Amendment by Leave of Court.**—The judge presiding at the trial has full power of amendment of pleadings.⁷ But a referee can not order an amendment. And after the case is submitted the referee can not allow the plaintiff to introduce an amended complaint, and compel the defendant to file an amended answer.⁸ In New York the power of the referee to allow amendments at the trial is the same as that of the judge, and his exercise of discretion will rarely be interfered with.⁹

Amendments should be liberally allowed by the court, in furtherance of justice.¹⁰ But the refusal to allow them is presumed to be right, unless the character of the proposed amendment is shown on the record.¹¹ Amendments are within the discretion of the court, and can not be controlled by *mandamus*;¹² and are governed by their own rules and modes of practice.¹³ Where the pleading is defective, demurrer should be sustained, and leave be granted to amend.¹⁴ And if the plaintiff then declines, final judgment should be given,¹⁵ unless the complaint is so de-

¹ Lake v. Morse, 11 Ill. 587; Chase v. Dunham, 1 Paige Ch. 572; but see Cal. Code C. P., sec. 473; N. Y. Code, sec. 542.

² Follower v. Laughlin, 12 Abb. Pr. 105.

³ Walkenshaw v. Purzell, 32 How. Pr. 310.

⁴ Chapman v. Webb, 6 How. Pr. 390.

⁵ Harrington v. Slade, 22 Barb. 161; Troy etc. R. R. Co. v. Tibbits, 11 How. Pr. 168; Vibbard v. Roderick, 51 Barb. 616.

⁶ Jeroliman v. Cohen, 1 Duer, 632. The above are not all good authority in California, but may be consulted with profit.

⁷ See Cal. Code C. P., secs. 469, 470.

⁸ De la Riva v. Berreyesa, 2 Cal. 195.

⁹ Dougherty v. Valloton, 6 Jones & Sp. (N. Y.) 455.

¹⁰ I Van Santv. Pl. 809; McMillan v. Dana, 18 Cal. 339; Roland v. Kreyenhagen, Id. 455; Pierson v. McCahill, 22 Id. 127; Stringer v. Davis, 30 Id. 321; Vanderbilt v. Access. Transit Co., 9 How. Pr. 352.

¹¹ Jessup v. King, 4 Cal. 331.

¹² Smith v. Jackson, 1 Paine, 453; to the same effect: Ex parte Bradstreet, 7 Pet. 634.

¹³ Wright v. Hollingworth, 1 Pet. 165; United States v. Buford, 3 Id. 12.

¹⁴ Gallagher v. Delaney, 10 Cal. 410.

¹⁵ Id.

fective that it can not be made good by amendment.¹ After demurrer sustained, amendments may be made upon motion.² The party desiring amendment after demurrer sustained, must make his motion to the court, and he can not object on appeal that he was not permitted to amend when he made no offer.³ After demurrer sustained, defendant may be allowed to amend.⁴ After demurrer to defendant's answer sustained, it is in the discretion of the court to allow defendant to amend.⁵ Demurrer sustained, and plaintiff amends by making two counts instead of one. He can not, after trial, complain of error in sustaining the demurrer.⁶ So, also, if one defendant demurs to a complaint for misjoinder of another defendant, and the complaint is accordingly amended to obviate the objection by omitting the defendant wrongfully joined, a subsequent demurrer for failing to join such omitted defendant should not be sustained.⁷ To test the ruling on the demurrer, he should have gone to trial on the pleadings where the judgment on demurrer left them.⁸ In demurrer overruled to defective complaint, if defendant answers over, court will treat such complaint as amended.⁹

The filing of a new complaint after demurrer sustained is not the commencement of a new action.¹⁰ So of an amended answer which supersedes the original.¹¹ They simply take the place of the originals;¹² and copies of the instruments sued on must be annexed thereto.¹³ All amendments, which are not permitted of course under the sections of the code before quoted, must be authorized by the court. Section 473 of the California code of civil procedure provides that "the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of any party, or a mistake in any other respect; and may upon like terms enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading

¹ Lord v. Hopkins, 30 Cal. 76.

² Smith v. Yreka Water Co., 14 Cal. 201; Gallagher v. Delaney, 10 Id. 410.

³ Smith v. Yreka Water Co, 14 Cal. 201.

⁴ Pierson v. McCahill, 22 Cal. 127; Fish v. Reddington, 31 Id. 186.

⁵ Gillan v. Hutchinson, 16 Cal. 153.

⁶ Gale v. Tuolumne Water Co., 14 Cal. 25.

⁷ James v. Leport, 4 West Coast Rep. 584.

⁸ Gale v. Tuolumne Water Co., 14 Cal. 25.

⁹ Ward v. Moorey, Wash. Ter. 1864, p. 123.

¹⁰ Jones v. Frost, 28 Cal. 245.

¹¹ Id.; Gilman v. Cosgrove, 22 Id. 356.

¹² Barber v. Reynolds, 33 Cal. 497; Sands v. Calkins, 30 How. Pr. 1.

¹³ McEwen v. Hussey, 23 Ind. 395.

or proceeding in other particulars," etc. This section omits the words "upon affidavit showing good cause therefor," contained in section 68 of the practice act. Sections 542 and 723 of the New York code correspond substantially with the section above quoted.

§ 4448. **Amendments at Trial.**—The allowance of amendments at the trial is in the discretion of the court,¹ and that discretion will rarely be revised;² but for its abuse, the appellate court will interfere.³ Where from oversights of counsel, committed under pressure of business, pleadings are defective, amendments should be allowed with great liberality. In such cases, when an offer to amend is made at such a stage of the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality.⁴

Where the defendant lies by until trial, before objecting to the sufficiency of the complaint, it is a proper exercise of discretion in the court or referee to allow the necessary allegations to be supplied by amendment, if they do not amount to a new cause of action.⁵ But leave to amend allegations filed against an insolvent debtor, by inserting the name of another creditor, was refused after the jury was sworn.⁶ No material amendment can be allowed after the cause has been submitted to the jury, or a finding has been announced by a court.⁷ Where, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute can not be finally determined, the court should allow amendments on such terms as may be just,⁸ at any time after the commencement of the trial;⁹ or after a motion for nonsuit, if it would not operate as a surprise upon the defendant.¹⁰ It is always in time when it immediately follows an objection to the pleading, and does not come too late because made after plaintiff has closed his testimony.¹¹ And after defendants have closed their case, and before the case is submitted, plaintiffs may be allowed to supply an omission in the testimony occasioned by mistake or inadvertence.¹² A com-

¹ 1 Van Santv. Pl. 812, 818; 1 Whitt. Pr. 617; Puterbaugh's Ill. Pr. 526; Jackson v. Warren, 32 Ill. 331; Thornton v. Borland, 12 Cal. 438; Gillan v. Hutchinson, 16 Id. 153; Cooke v. Spears, 2 Id. 438; Stearns v. Martin, 4 Id. 227.

² Pierson v. McCahill, 22 Cal. 127.

³ Cooke v. Spears, 2 Cal. 409.

⁴ Kirstein v. Madden, 38 Cal. 163.

⁵ Woolsey v. Trustees of Rondout, 2 Keyes, 603.

⁶ Newton's Case, 2 Cranch C. C. 467.

⁷ Holcraft v. King, 25 Ind. 352.

⁸ Stringer v. Davis, 30 Cal. 318.

⁹ Peters v. Foss, 16 Cal. 357; Gavitt v. Doub, 23 Id. 79.

¹⁰ Farmer v. Cram, 7 Cal. 135; Valencia v. Couch, 32 Id. 339.

¹¹ Id.

¹² Priest v. Union Canal Co., 6 Cal. 170.

plaint may be amended before judgment and after verdict, so as to conform to the verdict.¹ And therefore can not be allowed in the appellate court,² unless the appeal be taken from judgment on demurrer,³ or from an order denying a new trial.⁴ Defendant may amend by inserting new matter,⁵ if not entirely foreign to the cause of action.⁶ The fact that such new matter was well known to defendant at the time the original answer was filed is no good reason why the amendment should not be permitted.⁷ Defendant may amend by striking out counterclaim, and setting up the defense of the statute of limitations.⁸ Or one of two defendants may be permitted severally to plead the statute, by filing a separate plea.⁹ It is not error to refuse to permit the defendant to set up the statute of limitations after he has answered to the merits.¹⁰

A defendant, by amending his answer, and taking issue on a new cause of action added to the complaint by amendment, waives all objection to such amendment.¹¹ Under the code of Louisiana, which allows general and special pleas if not inconsistent with each other, an amended answer, which but specifies a particular fact in aid of the general denial, is allowable.¹² If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made.¹³ An answer may be verified even at the close of the plaintiff's case.¹⁴ If the defendant does not know that too many are joined as plaintiffs till after the same appears in evidence, he should then apply for leave to amend his answer.¹⁵ If testimony offered by defendant is rejected because of a defective denial, defendant should be allowed to amend his denial.¹⁶ If defendant have acquired title to the demanded premises during litigation, and has not pleaded such title in a supplemental answer, it is not error to refuse to permit him on the trial to amend his answer so as to obviate the objection to the introduction of testimony excluded by the court under the original answer.¹⁷ But if the court refuses to allow the amendment, and

¹ Hooper v. Wells, 27 Cal. 35.

² Id.

³ Phelan v. Supervisors, 9 Cal. 15.

⁴ Argenti v. San Francisco, 30 Cal. 458.

⁵ Pierson v. McCahill, 22 Cal. 127.

⁶ Nevada & Sac. Co. Canal Co. v. Kidd, 28 Cal. 673.

⁷ Pierson v. McCahill, *supra*.

⁸ Wynan v. Remond, 18 How. Pr. 272.

⁹ Robinson v. Smith, 14 Cal. 244.

¹⁰ Stuart v. Lander, 16 Id. 375.

¹¹ Secor v. Law, 9 Bosw. 163.

¹² Andrews v. Hensler, 6 Wall. 254.

¹³ Mulford v. Estudillo, 32 Cal. 131.

¹⁴ Arrington v. Tupper, 10 Cal. 464;

Lattimer v. Ryan, 20 Id. 628.

¹⁵ Gillam v. Sigman, 29 Cal. 637;

Ackley v. Tarbox, 31 N. Y. 564.

¹⁶ Stringer v. Davis, 30 Cal. 318.

¹⁷ McMinn v. O'Connor, 27 Cal. 238.

evidence shows that the amendment would be immaterial, no injury results from the refusal.¹

§ 4449. **Amendments after Trial.**—Amendments after trial are allowed only with great caution, and on good cause shown.² In New York amendments may be made after judgment.³ The court, in its discretion, has an extraordinary power, even after judgment, to allow a pleading to be amended by inserting new allegations material to the case, but this power should be very sparingly exercised.⁴ Errors in the computation of interest may be corrected by motion in the court below.⁵ A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal.⁶ A court has the power to make an amendment *nunc pro tunc* by supplying the omission of a clerk to enter the appointment of a guardian *ad litem*.⁷ Where the decree is defective in not designating the defendants who are personally liable for the debt, and the record shows who they are, the court has the power to amend the judgment at any time by adding a clause designating the defendants who are personally liable. The proper remedy in such a case is to move to amend the judgment by supplying the omission.⁸ When the judgment entered by the clerk does not conform to that pronounced by the court, it will be corrected on motion, even after an appeal and affirmance of the judgment, and the issuing and service of an execution in the cause.⁹ Where the complaint might have been amended on the trial, and proof is given sufficient to constitute a cause of action, the court after the trial will amend the complaint *nunc pro tunc*.¹⁰ The verdict of a jury may be amended where there is no doubt as to the facts.¹¹ A judgment may be amended by substituting leave to serve a new complaint in place of dismissal without prejudice so as to save the statute of limitations.¹² Judgment in replevin for value of property, instead of in alternative for delivery or value, may be corrected on motion.¹³ Signature to jurat to affidavit of “no answer” may be added after entry of judgment.¹⁴ And a judgment record may be amended by filing

¹ Jones v. Black, 30 Cal. 227.

² 1 Van Santv. Pl. 814; Houghton v. Skinner, 5 How. Pr. 420.

³ Code, secs. 722, 723.

⁴ Field v. Hawkhurst, 9 How. Pr. 75; Malcom v. Baker, 8 Id. 301; Egert v. Wicker, 10 Id. 193.

⁵ Whitney v. Buckman, 13 Cal. 536.

⁶ Anderson v. Parker, 6 Cal. 197.

⁷ Sprague v. Litherberry, 4 McLean, 442.

⁸ Leviston v. Swan, 33 Cal. 480.

⁹ Rousset v. Boyle, 45 Id. 64.

¹⁰ Coleman v. Pleystead, 36 Barb. 27; S. C. on appeal, 40 N. Y. 341.

¹¹ Emerson v. Bleakley, 5 Abb. Pr., N. S., 350.

¹² N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357.

¹³ Young v. Atwood, 5 Hun, 234.

¹⁴ Fawcett v. Vary, 59 N. Y. 597.

affidavit of no answer.¹ The court below, while an appeal is pending in the court of appeals, have control of the judgment for the purpose of making amendments.² The supreme court has no power to amend the record brought into it on an appeal from an inferior court.³ An omission of an averment necessary to give jurisdiction can not be amended after judgment.⁴

The court has power to authorize amendments when there is anything in the record to amend by;⁵ such as clerical errors in its own records, even after a great lapse of time, and without any notice to the parties, and without their presence; and such action can not be questioned by another court, even upon error.⁶ A court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the court.⁷ While the term lasts, the court has power to amend the records. After the term has passed, the record can not be amended, unless there is something in the record to amend by.⁸ Under section 473 of the California code of civil procedure, the court may relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect; and where, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. Under the same section, a defendant who has not been personally served may be allowed, upon just terms, at any time within one year after the rendition of the judgment, to answer to the merits of the original action. Where, on appeal from any order granting a new trial, the supreme court affirmed the "judgment" below, and the *remittitur* was issued, and then, at a subsequent term, respondent moved the court to amend its judgment by making it read, "the order of the district court granting a new trial is affirmed," instead of, "the judgment is affirmed," it was held that the motion will be

¹ *Tradesman's Nat. Bank v. McFeeley*, 3 Hun, 699.

² *Judson v. Gray*, 17 How. Pr. 289; to the contrary, *Bryan v. Berry*, 8 Cal. 473.

³ *Gould v. Glass*, 10 Barb. 179.

⁴ *Smith v. Jackson*, 2 Paine C. C.

486; compare *Fisher v. Rutherford*, 1 Baldw. 188.

⁵ *Randolph v. Barrett*, 16 Pet. 138.

⁶ *Cromwell v. The Bank of Pittsburgh*, 2 Wall. jun. C. C. 569.

⁷ *Morrison v. Dapman*, 3 Cal. 255.

⁸ *Branger v. Chevalier*, 9 Cal. 172.

granted, on the principle that courts have the power to amend clerical errors, and enter a judgment *nunc pro tunc*, where the record itself discloses the error, even though the term has elapsed. Costs of motion are not allowed.¹ After an appeal in which judgment on the demurrer sustained is affirmed, plaintiff can not be granted leave to amend complaint.² Where a demurrer to a complaint is sustained in the court below, and plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the supreme court, if it affirm the judgment, can not grant plaintiff leave to amend his complaint.³ When a final judgment, on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend on application to the court below.⁴

Upon the trial, every material allegation of the complaint not specifically controverted is to be taken as true; but if the defendant supposed he had denied material allegations, and the court sustained his view of the answer, the appellate court, when it reverses the judgment, may allow the court below to exercise its discretion in permitting the answer to be amended.⁵ Thus, where a judgment in favor of defendant had been reversed by the supreme court, on the ground that certain material evidence which had been received in his favor, was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection, it was held that as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the court.⁶ But where a defendant admits in his answer, under oath, a material allegation of the complaint, and the case is tried and judgment rendered, and afterward a new trial is granted by the supreme court, the defendant should not be allowed to amend his answer by changing the admission into a denial.⁷ On appeal taken by defendant immediately after judgment or default, on the ground of insufficiency of the affidavit of publication of summons, the appellate court will not disturb the judgment, the defendant having his remedy in the courts below within six months after judgment.⁸ Upon the *remittitur* of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights

¹ Swain v. Naglee, 10 Cal. 127.

² Bryan v. Berry, 8 Cal. 134; People v. Jackson, 24 Id. 633.

³ Id.

⁴ Williamson v. Blattan, 9 Cal. 500; Phelan v. City of San Francisco, Id. 15;

McDonald v. Bear River Water and Mining Co., 15 Id. 149.

⁵ Fish v. Reddington, 31 Cal. 186.

⁶ Pierson v. McCahill, 22 Cal. 127.

⁷ Spanagel v. Reay, 47 Cal. 608.

⁸ Guy v. Ide, 6 Cal. 99.

for the determination of a jury, they should be permitted to do so.¹

§ 4450. **What Amendments should be Allowed.**—Plaintiffs should be permitted so to amend as to present for determination their legal rights;² or to express the cause of action originally intended;³ or to strike out a cause of action;⁴ or to strike out a claim for damages;⁵ or to increase the amount of damages claimed,⁶ even after issue joined;⁷ or to change the venue.⁸ If a wife should intervene in an action, or file a separate defense, plaintiff may amend.⁹ A plaintiff may amend by inserting averments of prior appropriation, a diversion by defendants, with a prayer for an injunction.¹⁰ In attachment, pending motion to dissolve the attachment, plaintiff may have leave to amend the complaint.¹¹ Circumstances authorizing an arrest, occurring subsequent to filing the complaint, should be set forth in a supplemental complaint.¹² Leave may be granted to fill blanks in complaint, and reply specially to plea of statute of limitations on payment of full costs.¹³ A variance between the writ and the complaint in respect to the return-day may be amended.¹⁴ The assignee may amend the assignment by inserting the words, "For value received, I hereby assign the within account."¹⁵ A garnishee may amend his answer by correcting an error which could not reasonably have been avoided.¹⁶ Petitions in railroad proceedings may be amended.¹⁷ The omission to show in an information, in the nature of a writ of *quo warranto*, that the offices usurped are corporate offices, may be amended.¹⁸ In slander, by amendment, the words charged may be changed.¹⁹ If the plaintiff mistakes his remedy, and brings an action at law for damages, when it should have been in equity for an accounting, but inserts some averments in the complaints, entitling him to some measure of equitable relief,

¹ McDonald v. B. R. & A. W. & M. Co., 15 Cal. 149.

² McDonald v. B. R. & A. W. & M. Co., 15 Cal. 145; Nevada & S. C. Co. v. Kidd, 28 Id. 673.

³ Id.

⁴ Watson v. Rushmore, 15 Abb. Pr. 51.

⁵ Grass Valley Q. M. Co. v. Stackhouse, 6 Cal. 413.

⁶ 1 Van Santv. Pl. 364; Gregg v. Gier, 4 McLean, 208.

⁷ Merchant v. New York Life Ins. Co., 2 Sandf. 669.

⁸ Stryker v. New York Exch. B'k, 42 Barb. 511.

⁹ Moss v. Warner, 10 Cal. 296.

¹⁰ Nevada & S. C. Co. v. Kidd, 28 Cal. 673.

¹¹ Hathaway v. Davis, 33 Cal. 161.

¹² Davis v. Robinson, 10 Cal. 411.

¹³ Ferris v. Williams, 1 Cranch C. C. 281.

¹⁴ Duvall v. Craig, 2 Wheat. 45; Wilder v. McCormick, 2 Blackf. 31.

¹⁵ Ryan v. Maddox, 6 Cal. 247.

¹⁶ Smith v. Browne, 5 Cal. 118.

¹⁷ Contra Costa R. R. Co. v. Moss, 23 Cal. 325.

¹⁸ Gunton v. Ingle, 4 Cranch C. C. 438.

¹⁹ Dougherty v. Bentley, 1 Cranch C. C. 219.

the appellate court will send the case back with leave to amend the complaint.¹

Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity if his pleadings had been properly framed, amendments may be allowed to conform the pleadings to the facts proved.² As to the propriety of allowing an amendment to conform the pleadings to the facts proved, consult the authorities cited below. If evidence is objected to because the defense under which it is offered is defectively pleaded, the court should allow the pleading to be amended.³ In ejectment, amendments are liberally allowed.⁴ The date of the devise may be amended so as to conform to the title,⁵ or may extend the term of the fictitious lease even after judgment.⁶ But amendments by adding a count stating a demise under a new title are not allowed, as distinct ejectments may be brought to try them.⁷ A declaration in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, stated two demises, by citizens of different states. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of a citizen of another state: it was held that a judgment upon the new count was valid.⁸

§ 4451. **Practice on Amendments.**—An amended complaint may be filed without prejudice to an injunction issued on the original complaint.⁹ If the complaint is amended, a copy of the amendments must be filed, or the court may in its discretion require the complaint as amended to be filed, and a copy of the amendments to be served upon the defendants affected thereby. The defendant must answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer as in other cases.¹⁰ If the time for answer is not fixed, then the defendant should answer within the same time required in case of service of the original com-

¹ Blood v. Fairbanks, 48 Cal. 171.

² Stringer v. Davis, 30 Cal. 318; Connalley v. Peck, 3 Id. 82; Tryon v. Sutton, 13 Id. 494; Valencia v. Couch, 32 Id. 339; Bedford v. Terhune, 30 N. Y. 453; Walsh v. Washington Marine Ins. Co., 32 Id. 427; Van Buskirk v. Stow, 42 Barb. 9.

³ Carpentier v. Small, 35 Cal. 346.

⁴ Walden v. Craig, 9 Wheat. 576.

⁵ Blackwell v. Patton, 7 Cranch, 471;

Smith v. Vaughan, 10 Pet. 367; McDaniel v. Wailes, 4 Cranch C. C. 201.

⁶ Waldon v. Craig, 14 Pet. 147; Ledgerwood v. Pickett, 1 McLean, 143.

⁷ Gale v. Babcock, 4 Wash. C. C. 199.

⁸ Wright v. Hollingsworth, 1 Pet. 165.

⁹ Barber v. Reynolds, 33 Cal. 497.

¹⁰ Cal. Code C. P., sec. 432.

plaint.¹ When a demurrer to a pleading is sustained, the adverse party shall have ten days from service of notice of the entry of the order in which to amend the pleading demurred to, and to file and serve such amended pleading. The party whose demurrer has been sustained shall have ten days from such service in which to answer or demur to such amended pleading. The court may impose such terms as it may deem proper on granting leave to file such amended pleadings.² In cases where the right to amend any pleading is not of course, the party desiring to amend, together with the notice of application to amend, shall serve an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where the amendment is to be inserted; and if the pleadings were verified, shall verify such amended pleading, or such proposed amendment, before the application shall be heard. No pleading shall be amended by verifying the same when the original was not verified. So when defendant is allowed time to answer until plaintiff elects upon which count of the complaint he will go to trial, the plaintiff should serve a copy of complaint with the notice of his election.³ In New York the defendant in an action has the right to serve an amended answer within twenty days after the service of the original, and to include therein a new defense; and this without regard to the nature of the defense.⁴ Under the code it is the practice where a party amends his pleadings, either of course or after obtaining consent or leave, to serve a new pleading; and it supersedes the original. It is the practice, too, to designate it on its face as an amended complaint or answer, as the case may be; though it has been held that the omission to designate it does not render it void.⁵ Where amendments are made without authority, a motion to strike them out can be made at any time.⁶ As a general rule, a party can not judge for himself of the sufficiency of a pleading, or of the materiality of an amendment, but must bring the question before the court.⁷ But when an amended pleading, in which the amendments are clearly frivolous or immaterial, is served immediately before the circuit, and obviously for the mere purpose of delay, it may be

¹ *People v. Rains*, 23 Cal. 128.

² See Cal. Code C. P., sec. 476.

³ *Willson v. Cleaveland*, 30 Cal. 192.

⁴ *McQueen v. Babcock*, 3 Keyes, 428.

⁵ *Hurley v. Second Building Association*, 15 Abb. Pr. 206, note.

⁶ *Church v. Syracuse Co.*, 32 Conn. 372.

⁷ *Vanderbilt v. Bleeker*, 4 Abb. Pr. 289.

disregarded.¹ Where the court has allowed the plaintiff, after the defendant has filed a plea in abatement, to amend his writ and declaration to meet the case presented by the plea, the defendant who has appeared for the purpose of pleading in abatement only is thereby put out of court; and a judgment by default may be rendered against him if he fail to appear again and plead to the action.²

§ 4452. Notice of Motion for Leave to Amend.

Form No. 1085.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned will move the court, at the court-room thereof, at on the day of, 18.., at o'clock, in the noon, or as soon thereafter as counsel can be heard, for leave to amend his complaint herein, by the insertion of the following clause, to wit [here insert proposed amendment], after the word ".....," on line, of page thereof, and for such other and further relief as may be just.

[DATE.]

[SIGNATURES.]

§ 4453. Order Giving Leave to Amend.

Form No. 1086.

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, and the proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is hereby ordered that the plaintiff have leave to amend his complaint, on file in this action, by inserting the following, to wit [here insert amendment], after the word ".....," on line, of page thereof.

[DATE.]

[SIGNATURE.]

§ 4454. Statement in Order.—An order granting leave to amend generally, without specifying in what particular, is improvident.³

§ 4455. Notice of Motion to Strike out Irrelevant or Redundant Matter.

Form No. 1087.

[TITLE.]

[ADDRESS.]

Please take notice, that on [the affidavit herewith served, and] the pleadings on file in this action, the undersigned will move

¹ *Vanderbilt v. Bleeker*, 4 Abb. Pr. 289.

³ *Thompson v. Malone*, 13 Rich. L. 252.

² *Randolph v. Barrett*, 16 Pet. 138.

the court, at the court-room thereof, at, on the day of, 18.., at o'clock in thenoon, or as soon thereafter as counsel can be heard, to strike out matter contained in the complaint [or answer] herein, from and after the word ".....," on line of page, down to and including the word ".....," on line of page, as irrelevant [or redundant], and for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

§ 4456. **Statement in Motion.**—Motion to strike out must specifically point out the objectionable matter.¹ Motion to strike out immaterial portions of the pleadings are not parts of the judgment roll. They are no part of a record on appeal unless made so by a statement.²

§ 4457. **Order to Strike out Irrelevant or Redundant Matter.**

Form No. 1088.

[TITLE.]

On reading and filing [designate motion papers], and on motion of G. H., for the defendant, and after hearing E. F., attorney for plaintiff, in opposition thereto:

It is ordered that the matter contained in the complaint [or answer] in this action, from the word ".....," on line of page, down to and including the word ".....," on line of page, be stricken out as redundant [or irrelevant].

[DATE.]

[SIGNATURE.]

§ 4458. **Irrelevant Pleading Defined.**—A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action.³ It includes prolixity or needless details of material matter.⁴ Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action.⁵

§ 4459. **What may be Stricken out.**—Sham and irrelevant answers, and irrelevant and redundant matter, inserted in a pleading, may be stricken out on such terms as the court may in its discretion impose.⁶ Redundant or irrelevant pleadings may be objected to by motion, but not by demurrer.⁷ A motion by the defendant to strike out certain portions of the plaintiff's complaint as irrelevant and redundant was granted, with leave

¹ People v. Empire G. & S. M. Co., 33 Cal. 171. Pr. 435; Russ v. Brooks, 4 E. D. Smith, 642.

² Sutter v. San Francisco, 36 Id. 112.

³ Seward v. Miller, 6 How. Pr. 313.

⁴ Lee Bank v. Kitching, 11 Abb.

⁵ Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673; see sec. 191 et seq.

⁶ Cal. Code C. P., sec. 453.

⁷ Kinyon v. Palmer, 18 Iowa, 377.

also to the plaintiff "to amend his summons and complaint as he should be advised." The plaintiff thereupon amended his summons in pursuance of such leave, and at the same time gave notice of his election not to amend his complaint under the leave given. The defendant thereupon answered the complaint; and within twenty days after receiving such answer, the plaintiff served an amended complaint: it was held that the plaintiff was entitled to amend the complaint again, of course, after defendant had thus answered.¹ It seems that the right to move to strike out an answer for irrelevancy, and the right to demur to an answer for insufficiency, were not designed for the same purpose; and it is not optional with the plaintiff whether he will resort to a demurrer or to a motion to test the sufficiency of the answer.² If irrelevancy is not palpable, it should not be stricken out, but demurrer will lie.³ Irrelevant matter in a complaint may be stricken out on motion;⁴ or immaterial matter;⁵ or averments of deraignments of title;⁶ or superfluous matter, when inserted by itself,⁷ such as the name of plaintiff's wife.⁸ And in general every fact not essential to a claim or defense.⁹ If a copy of a written contract sued on be attached to the complaint, and the averments of the complaint put a false construction of law upon the terms of the contract, such averments may be regarded as surplusage.¹⁰ Allegations in the complaint which are absurd or impossible may be stricken out.¹¹ Where the facts stated in the complaint constitute a sufficient cause of action, other unnecessary matter may be stricken out, and demurrer will not lie. But an entire pleading can not be stricken out as irrelevant or redundant.¹²

§ 4460. Notice of Motion to Require Plaintiff to Elect between Several Counts of Complaint, in Certain Cases.

Form No. 1089.

[TITLE.]

[ADDRESS.]

Please take notice that upon the pleadings on file in this action, and on an affidavit, of which a copy is herewith served,

¹ Ross v. Dinsmore, 12 Abb. Pr. 4.

² Littlejohn v. Greeley, 13 Abb. Pr. 311.

³ Id.; Struver v. Ocean Ins. Co., 9 Abb. Pr. 23; Waddell v. Cook, 2 Hill. 47; Littlejohn v. Greeley, 22 How. Pr. 345; see, however, Lee Bank v. Kitching, 11 Abb. Pr. 439. See, as to notice, Bailey v. Lane, 13 Id. 354; as to pendency of motion, Kellogg v. Baker, 15 Id. 286.

⁴ Green v. Palmer, 15 Cal. 411; Bowen v. Aubrey, 22 Id. 566.

⁵ Larco v. Casaneuava, 30 Cal. 560.

⁶ Id.; Willson v. Cleaveland, 30 Cal. 192.

⁷ Boles v. Cohen, 15 Id. 150.

⁸ Warner v. Steamship Uncle Sam, 9 Id. 697.

⁹ Green v. Palmer, *supra*.

¹⁰ Stoddard v. Treadwell, 26 Cal. 294.

¹¹ Sacramento Co. v. Bird, 31 Cal. 66; see further, sec. 191 et seq.

¹² Benedict v. Dake, 6 How. Pr. 352; but see Cal. Code C. P., sec. 453.

the undersigned will move the court, at the court-room thereof, at, on theday of....., 18.., at o'clock in thenoon, or as soon thereafter as counsel can be heard, that the plaintiff be compelled to elect between the cause of action stated in the first count and the cause of action stated in the second count in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just, and for the costs of this motion.

[DATE.]

[SIGNATURE.]

§ 4461. **Practice.**—When the defendant is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint, with the notice of his election.¹

§ 4462. **Affidavit on Motion to Compel Plaintiff to Elect between Several Counts of Complaint.**

Form No. 1090.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. I am the defendant in the above-entitled action [or show in some way deponent's knowledge of the facts].

II. That only one transaction of the nature mentioned in either of the alleged causes of action set forth in the complaint ever occurred between deponent and the plaintiff, and that the transactions mentioned in both of the said alleged causes of action are in fact one and the same.

[JURAT.]

[SIGNATURE.]

§ 4463. **Notice of Motion to Strike out Sham Answer.**

Form No. 1091.

[TITLE.]

[ADDRESS.]

Take notice that on the affidavit herewith served, and on the pleadings on file in this action, the undersigned will move the court, at the court-room thereof, at, on the day of, 18.., at o'clock in thenoon, or as soon thereafter as counsel can be heard, to strike out the second defense in the answer herein as sham, and the third defense as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

§ 4464. **Statement in Motion.**—A plaintiff may, on one motion, ask: 1. To strike out defenses as sham and irrelevant;

¹ Willson v. Cleaveland, 30 Cal. 192.

2. For judgment on a demurrer as frivolous; 3. To strike out irrelevant and redundant matter; 4. To have the allegations made definite and certain.¹ The proper mode of taking advantage of defect in an answer which improperly blends and defectively states matters set forth therein, is by motion to strike out either the whole of it, or such parts as are defectively pleaded.²

§ 4465. Notice of Motion to Strike out Irrelevant Answer.

Form No. 1092.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the pleadings on file in this action, the undersigned will move the court, at the court-room thereof, at, on the day of, 18..., at the hour of o'clock in thenoon, or as soon thereafter as counsel can be heard, to strike out the answer herein as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

§ 4466. Ambiguous Answer.—If an answer is ambiguous, and does not sufficiently disclose the particulars of a transaction relied on a defense, the plaintiff's remedy is by motion, under section 546 of the code of procedure of New York, to make the answer more definite and certain. He can not accept the plea and go to trial upon it, and then interpose the objection for the first time that it is not sufficiently descriptive of the particulars relied on.³ In California, under subdivision 3 of section 444 of the code of civil procedure, demurrer would lie in such a case.

§ 4467. Answer with Denials Only.—Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial can not be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on the application of the plaintiff.⁴ A verified answer of denial should not be stricken out as sham, even after the defendant, on examination before trial, has admitted what the answer denies.⁵ Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or

¹ *People v. McCumber*, 15 How. Pr. 186; S. C., 18 N. Y. 315.

² *Kinney v. Miller*, 25 Mo. 576.

³ *Farmers' and Citizens' Bank v. Sherman*, 33 N. Y. 80.

⁴ *Fay v. Cobb*, 51 Cal. 313; see also *Amador Co. v. Butterfield*, Id. 526;

Wayland v. Tysen, 45 N. Y. 281, reversing 9 Abb. Pr., N. S., 79; *Claffin v. Jaroslanski*, 64 Barb. 463; *Strong v. Sproul*, 53 N. Y. 497, reversing S. C., 4 Daly, 326.

⁵ *Schultze v. Rodewald*, 1 Abb. N. C. 365.

by motion to strike out the answer on the ground that it is sham. If some of the denials are deemed good and the others bad, he may move to strike out the latter. Answers consisting of denials which do not explicitly traverse the material allegations of the complaint we hold so far sham and irrelevant, within the meaning of the statute.¹

§ 4468. **Discretion of Court.**—An answer filed without leave, after time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity, and the court in its discretion may strike it out or retain it.² The motion to strike out answers, because denying on information and belief, and for judgment on the complaint, is held to be properly overruled.³

§ 4469. **Informal Answers.**—If the answer has the signature of the attorney of record, and that of an associate attorney, attached to it, the court will not strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority.⁴ If an answer tends to constitute a defense, it is not irrelevant, however informal or inartificial.⁵

§ 4470. **Proceedings on Motion to Strike out.**—When plaintiff moves on affidavit to strike out a defense as “sham,” the affidavit of defendant that his defense is *bona fide* will defeat the motion.⁶ When, to resist a motion to strike out as sham a defense good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified, nor questioned, and which tend to sustain the defense, the motion should be denied.⁷ On motion to strike out as sham an answer of joint defendants, where it appears that some of the defendants may have a valid defense, they may be permitted to serve an amended answer, which would be denied to the other defendants who show no merits.⁸

¹ Gay v. Winter, 34 Cal. 153.

² Bower v. Dickerson, 18 Cal. 420.

³ Comerford v. Dupuy, 17 Cal. 308; Oregonian R'y Co. v. Oregon R. & N. Co., 4 West Coast Rep. 548.

⁴ Willson v. Cleaveland, 30 Cal. 192.

⁵ Wallace v. Bear River Water and Mining Co., 18 Cal. 461; Gregory v. Wright, 11 Abb. Pr. 417; Dovan v. Dinsmore, 33 Barb. 86; De Forest v. Baker, 1 Abb. Pr., N. S., 34.

⁶ Gostorfs v. Taaffe, 18 Cal. 385; Beebe v. Marvin, 17 Abb. Pr. 194; see Wedderspoon v. Rogers, 32 Cal. 569, where authorities are collected.

⁷ Hadden v. New York Silk Manufacturing Co., 1 Daly, 388.

⁸ Burrall v. Bowen, 21 How. Pr. 378. As to proceedings on motion to strike it out generally, see Grogan v. Ruckle, 1 Cal. 193; Kellogg v. Baker, 15 Abb. Pr. 286. On motion denied: Seward v. Miller, 6 How. Pr. 312; Miln v. Vose, 4 Sandf. 660. On motion granted: Aymar v. Chase, 1 Code R., N. S., 141; Burrall v. Bowen, 21 How. Pr. 378. On leave to file amended answer: Mussini v. Stillman, 13 Abb. Pr. 93.

§ 4471. **Sham Answer Defined.**—A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false.¹ A defense is a sham which is so clearly false as not to present any substantial issue.² To sustain the motion, falsity and bad faith should both be established;³ as there is a distinction between a false answer and a frivolous answer.⁴ A false answer, not verified, is a sham answer.⁵ Sham pleading is the setting up of a defense which has not only no foundation in fact, but which, it is manifest, was interposed for vexation or delay.⁶

§ 4472. **Sham Defense, how Tested.**—Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham.⁷ An answer will not be adjudged to be sham simply upon an affidavit that it is false, for this would be trying the merits of the defense upon affidavits. But the court must be satisfied from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the pleader was to delay or annoy the plaintiff, or to trifle with the court.⁸ To warrant striking out a pleading as frivolous, it must be clearly bad on inspection merely.⁹ The right of a defendant to have the issues tried by a jury depends on the existence of a real issue, and the court has power to try, on motion, the question whether there is a substantial issue, or only a sham and fictitious one.¹⁰

§ 4473. **Sham Answers may be Stricken out.**—Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the court, in its

¹ *Piercy v. Sabin*, 10 Cal. 22; *Gos-torfs v. Taaffe*, 18 Id. 385; *Leach v. Boynton*, 3 Abb. Pr. 1.

² *Brewster v. Hall*, 6 Cow. 34; *Oakley v. Devoc*, 12 Wend. 196; *People v. McCumber*, 18 N. Y. 315, 323.

³ *Hadden v. New York Silk Manufacturing Co.*, 1 Daly, 388; *Kellogg v. Baker*, 15 Abb. Pr. 286; *Lockwood v. Salhenger*, 18 Id. 136.

⁴ *Hecker v. Mitchell*, 5 Id. 453; *Hull v. Smith*, 8 How. Pr. 150; *Davis v. Potter*, 4 Id. 155.

⁵ *Brewster v. Hall*, 6 Cow. 34; *Slack v. Cotton*, 2 E. D. Smith, 398; *Oakley v. Devoc*, 12 Wend. 196; *Nichols v. Jones*, 6 How. Pr. 355; *Ostrom v.*

Bixby, 9 Id. 57; *Walker v. Hewitt*, 11 Id. 398; *People v. McCumber*, 18 N. Y. 320.

⁶ *Hadden v. New York Silk Manufacturing Co.*, 1 Daly, 388.

⁷ *Gay v. Winter*, 34 Cal. 152.

⁸ *Mayor etc. v. Dias*, 1 East, 237; *Smith v. Oriell*, Id. 369; *White v. Howard*, 3 Taunt. 339; *King, The, v. Woolf*, 1 Chit. 424, and note a; *Bones v. Bunter*, Id. 564, and note a; 5 Barn. & Adol. 750, note a; *Brewster v. Hall*, 6 Cow. 34; *Hadden v. New York Silk Manufacturing Co.*, 1 Daly, 383.

⁹ *Smith v. Mead*, 14 Abb. Pr. 262.

¹⁰ *People v. McCumber*, 18 N. Y. 315, 323.

discretion, may impose.¹ These provisions apply equally to mere denials of allegations of the complaint as to affirmative matter, and equally to verified as to unverified answers;² as the verification of an answer is no bar to the motion.³

§ 4474. **Unverified Answers.**—An answer unverified to a verified complaint may be stricken out on motion; for if the complaint is sworn to, a general denial in the answer admits all its material allegations.⁴ And though the inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, yet it can not avail in resisting a motion to strike out, and for judgment after the answer is filed.⁵ But it was held that the objection should have been raised in the court below, and been passed upon, and that plaintiff having rested his cause at the trial, on the ground of want of an affidavit, he will not be permitted to say here for the first time that the answer does not in a proper form controvert the allegations of the complaint.⁶ To a complaint against three persons, upon a promissory note executed under a firm name, one of the defendants answered, denying his liability, and that he was one of the firm by whom the note was executed. Neither of the pleadings were verified. When the cause came on for trial, plaintiff moved to strike out defendant's answer for want of verification, and pending the motion, defendant asked leave to then verify the answer. The court denied defendant's motion, and struck out the answer: it was held that the refusal by the court to allow the verification was such an abuse of discretion as to amount to error.⁷ By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange by requiring a sworn answer.⁸

§ 4475. **What may be Stricken out of Answer.**—A denial of a legal conclusion.⁹ The denial of immaterial averments of the complaint. So a denial on want of any knowledge or information sufficient to form a belief, of matter presumptively within the knowledge of the defendant.¹⁰ A defense of a verbal agreement, contemporaneous with making of note, to re-

¹ Cal. Code C. P., sec. 453.

² *People v. McCumber*, 18 N. Y. 315, 323.

³ *Lawrence v. Derby*, 24 How. Pr. 133; S. C., 15 Abb. Pr. 346. This principle was questioned in *Gostoris v. Taaffe*, 18 Cal. 385.

⁴ *Pico v. Colimas*, 32 Cal. 578.

⁵ *Drum v. Whiting*, 9 Cal. 422.

⁶ *Grogan v. Ruckle*, 1 Cal. 193.

⁷ *Lattimer v. Ryan*, 20 Cal. 628; see further, sec. 3179.

⁸ *Brooks v. Chilton*, 6 Cal. 640.

⁹ *Wedderspoon v. Rogers*, 32 Cal. 569; *Seeley v. Engell*, 17 Barb. 530.

¹⁰ *Lawrence v. Derby*, 15 Abb. Pr. 346, note; S. C., 24 How. Pr. 134; *Beebe v. Marvin*, 17 Abb. Pr. 194.

new it at maturity.¹ An objection which ought to have been taken by demurrer, but is taken only by allegation in the answer, should be stricken out.² The objection that the allegations of an answer are hypothetical is not available on demurrer,³ but on motion to strike out. So the unessential parts of an answer may be stricken out;⁴ or the denial only of what is non-essential in the complaint, for this is an admission of all that is essential to a recovery.⁵ If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system.⁶

§ 4476. **When Motion should be Made.**—An answer can not be stricken out after issue joined. If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it can not then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.⁷ Where certain material averments of the plaintiff's complaint were so defectively denied that, upon motion, such denials might properly have been stricken out as sham and irrelevant, yet without such objection made thereto, the plaintiff introduced proof at the trial in their support, it was held that by introducing said proof the plaintiff waived all objection to the sufficiency of said denials, and the court properly refused an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of said trial.⁸ Where party sets up matter in his answer not recognized by law as a defense to the action, it may be taken advantage of at any time.⁹ If the defendant files his answer at the same time he does his demurrer, the court, after overruling the demurrer, has no right to strike out an answer which raises a defense, because the defendant fails to pay the plaintiff twenty dollars, required by a rule of court to be paid for the privilege of answering when a demurrer is overruled.¹⁰

¹ Bailey v. Lane, 13 Abb. Pr. 359; S. C., 21 How. Pr. 475; Shoe and Leather Bank v. Camp, Id. 443. What matters may be struck out of an answer as scandalous, immaterial, etc., see Griswold v. Hill, 1 Paine, 390; Langdon v. Goddard, 3 Story C. C. 13.

² Gassett v. Crocker, 10 Abb. Pr. 133.

³ Nye v. Ayres, 1 E. D. Smith, 553; Wies v. Fanning, 9 How. Pr.

543; Taylor v. Richards, 9 Bosw. 679.

⁴ Green v. Palmer, 15 Cal. 411.

⁵ Leffingwell v. Griffing, 31 Cal. 231.

⁶ Klink v. Cohen, 13 Cal. 623; Uridias v. Morrill (No. 2), 25 Id. 35.

⁷ Abbott v. Douglass, 28 Cal. 295.

⁸ Tynan v. Walker, 35 Cal. 634.

⁹ Case v. Marey, 6 Cal. 276; McDougall v. Maguire, 35 Id. 274.

¹⁰ People v. McClellan, 31 Cal. 101.

§ 4477. **Order Striking out Irrelevant Answer.***Form No. 1093.*

[TITLE.]

On reading and filing [designate motion papers], and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is ordered that the answer of C. D., the defendant in this action, be stricken out as irrelevant, with dollars costs to plaintiff.

[DATE.]

[SIGNATURE.]

§ 4478. **Order not Appealable.**—Orders striking out immaterial portions of pleadings are not appealable.¹

§ 4479. **Notice of Motion for Leave to Correct Fictitious Name.***Form No. 1094.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the pleadings and proceedings on file in this action, the undersigned will move this court, at the court-room thereof, at, on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his complaint by substituting the name of as the real name of the [defendant] in this action, wherever the name John Doe occurs in the papers filed in this action; or for such other relief as may be just.²

[DATE.]

[SIGNATURE.]

§ 4480. **Affidavit to Obtain Leave to Correct Fictitious Name.***Form No. 1095.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action.

II. I was not acquainted with the real name of the defendant therein until after the commencement of this action, and about days ago.

III. That the defendant was sued in said action under the fictitious name of, and that his real name is

[JURAT.]

[SIGNATURE.]

§ 4481. **Mistakes in Names, how Corrected.**—Mistakes in names of parties in a writ may be amended at a clerical mis-

¹ Sutter v. San Francisco, 36 Cal. 112; Briggs v. Bergen, 23 N. Y. 162; Beach v. Hodgdon, 4 West Coast Rep. 610.

² As a general rule, this is done by the suggestion of the true name, and its substitution in the place of the fictitious one.

prison, even after the adjournment of the term, but the record itself must show the error.¹ But where there is a mistake in the Christian name of one of the plaintiffs throughout the proceedings, the court can not amend the judgment upon evidence *aliunde*.² A declaration in the name of a firm may be amended by inserting the names of the members of the firm.³ A corporate name may be substituted for an individual name.⁴ A formal variance, in suing a defendant by a wrong name, is amendable at any time.⁵ On a plea of misnomer, the court may allow the plaintiff to amend the writ and declaration.⁶ Leave to amend the writ by changing the name of one of the plaintiffs may be refused.⁷

§ 4482. Order Giving Leave to Correct Fictitious Name.

Form No. 1096.

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, with proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney defendant:

It is ordered that the name of be substituted in the place of, as the real name of the defendant in this cause.

[DATE.]

[SIGNATURE.]

§ 4483. Notice of Motion to Amend Complaint by Adding Defendant.

Form No. 1097.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the proceedings on file in this action, the undersigned will move the court, at the court-room thereof, at on the day of, 18.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the plaintiff may have leave to amend his summons and complaint in this action, by adding L. M. as a defendant therein, with

¹ Hegeler v. Henckell, 27 Cal. 491; Furniss v. Ellis, 1 Brock. Marsh. 15; Elliott v. Holmes, 1 McLean, 466; Gillett v. Robbins, 12 Wis. 319.

² Albers v. Whitney, 1 Story C. C. 310; Jackson v. Warren, 32 Ill. 331; Johnson v. Adelman, 35 Id. 265; but see Henckler v. County Court, 27 Id. 39.

³ Tibbs v. Parrott, 1 Cranch C. C. 177.

⁴ Jackson v. Warren, 32 Ill. 331.

Leave was granted to correct the corporate name of the plaintiff: Corporation of Georgetown v. Beatty, 1 Cranch C. C. 234; see Cal. Code C. P., sec. 473.

⁵ Scull v. Briddle, 2 Wash. C. C. 200; Craig v. Brown, Pet. C. C. 139.

⁶ Randolph v. Barrett, 16 Pet. 141; Nelson v. Barker, 3 McLean, 379.

⁷ Comegyss v. Robb, 2 Cranch C. C. 141.

proper words to charge him, and for such other and further relief as may be just.

[DATE.]

[SIGNATURE.]

§ 4484. **Order of Court Granting Leave to Amend.**

Form No. 1098.

[TITLE.]

On motion of E. F., attorney for plaintiff in this action, notice thereof being duly served on the defendant's counsel, and after hearing thereon, it is hereby ordered that plaintiff have leave to amend his complaint filed herein.

§ 4485. **The Same—By Striking out and Making New Parties.**

Form No. 1099.

I. [Insert as in previous form.]

II. By striking out E. B. and E. D. from being plaintiffs, and by making them defendants in said action; or by adding E. F. as a defendant herein; or by substituting the name of Christian Doe as the real name of the defendant, instead of Charles Doe, wherever the same occurs in said complaint.

§ 4486. **Adding or Striking out Parties.**—The court may in furtherance of justice, and on such terms as may be proper, amend any pleading by adding or striking out parties.¹ The court will take notice of the want of necessary parties, and will ordinarily allow an amendment on just terms.²

§ 4487. **Discretion.**—When the court perceives that necessary and indispensable parties are wanting,³ it may grant leave to amend and bring them in,⁴ in its discretion,⁵ and on such terms as may be prescribed.⁶ But such an amendment can not be made without leave of court.⁷ But it has been held that an entire change of parties can not be allowed on amendment.⁸

§ 4488. **Motion, when Made.**—Whether, after striking out a party from the pleadings, the court can reinstate him, *quære*.⁹ On motion for nonsuit at the trial, plaintiff may be allowed to amend complaint by adding the name of a co-plaintiff,

¹ Cal. Code C. P., sec. 473; Heslep v. Peters, 3 Scam. 45; Jackson v. Warren, 32 Ill. 331; Curtis v. Sage, 35 Id. 22.

² Beals v. Cobb, 51 Me. 348.

³ Mechanics' Bank v. Seton, 1 Pet. 299.

⁴ Harrison v. Rowan, 4 Wash. 202; Dwight v. Humphreys, 3 McLean, 104.

⁵ Van Epps v. Van Deusen, 4 Paige Ch. 75; Vanderwerker v. Vander-

werker, 7 Barb. 221; Greenleaf v. Queen, 1 Pet. 138.

⁶ Cal. Code C. P., sec. 473; Vanderwerker v. Vanderwerker, 7 Barb. 221.

⁷ Rand v. Spear, 5 How. Pr. 142.

⁸ Wright v. Storms, 3 N. Y. Code R. 138; Davis v. Schermerhorn, 5 How. Pr. 440; Vanderwerker v. Vanderwerker, 7 Barb. 221.

⁹ Beach v. Covillaud, 2 Cal. 237.

on such terms as may be just,¹ even-after the close of plaintiff's testimony.² The court may at any time allow an amendment by inserting the name of a firm, where an action is brought in the name of one partner only.³

§ 4489. **Special Cases.**—In an action of *assumpsit* against two defendants tried by the court, the plaintiff, after a verdict against him upon the ground that a joint promise was not proved, can not amend by striking out one of the defendants.⁴ A suit may be amended by inserting the name of a copartner of the firm.⁵ In suit by a sheriff, for the use of execution creditors, the complaint may be amended by adding other execution creditors.⁶ In ejectment, complaint may be amended by making new parties plaintiff.⁷ Or judgment creditors, as subsequent encumbrancers, may be made parties to the action.⁸ In a suit on a foreclosure of mortgage, the complaint may be amended by making the original vendor a party defendant.⁹

§ 4490. **Striking out Parties.**—The misjoinder of parties may be corrected by amendment.¹⁰ Such amendment may be made so as to exclude parties irregularly included,¹¹ even after judgment rendered.¹² Plaintiffs may be allowed to amend before trial by striking out the name of one of the defendants.¹³ The court may allow an amendment of a complaint striking out the name of a plaintiff who was dead at the commencement of the suit.¹⁴

¹ 1 Van Santv. Pl. 134; Mechanics' Bank v. Seton, 1 Pet. 299; Acquital v. Crowell, 1 Cal. 191; Heath v. Lent, Id. 412; Farmer v. Cram, 7 Id. 135; Browner v. Davis, 15 Id. 9; Gavitt v. Doub, 23 Id. 78; Valencia v. Couch, 32 Id. 340.

² Polk v. Coffin, 9 Cal. 56; Hurley v. Second Building Association, 15 Abb. Pr. 206, note.

³ Dixon v. Dixon, 19 Iowa, 512.

⁴ Griffin v. Simpson, 45 N. H. 18.

⁵ Stuart v. Corning, 32 Conn. 105.

⁶ Glenn v. Black, 31 Ga. 393.

⁷ Chapin v. Curtenius, 15 Ill. 427.

⁸ Horn v. Volcano Water Co., 13 Cal. 62. As to effect of adding new parties, see Hurley v. Second Building Association, 15 Abb. Pr. 206, note; Elmore v. Vallette, 16 Id. 249.

⁹ Roddy v. Elam, 12 Rich. Eq. 343.

¹⁰ Heath v. Lent, 1 Cal. 410; Beach v. Covillaud, 2 Id. 237.

¹¹ Mulliken v. Hull, 5 Cal. 246.

¹² Browner v. Davis, 15 Cal. 9.

¹³ Bell v. Davis, 8 Barb. 210; Tobey v. Clafflin, 3 Sumn. 379.

¹⁴ Jemison v. Smith, 37 Ala. 185.

CHAPTER V

SUBSTITUTION OF PARTIES, AND CONTINUANCE OF CAUSE.

§ 4491. **In General.**—An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of any disability of a party, the court on motion may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.¹ It has been the uniform practice in California to permit the substitution to be made, on the suggestion of the death of the former party and satisfactory proof, on an *ex parte* motion, of the appointment and qualification of the administrator.² In ejectment, if plaintiff parts with the title pending the action, it may be continued in his name unless the grantee applies to be substituted.³ And if one purchases from the lessor of a defendant in ejectment, the purchaser is entitled to continue the defense either in the name of the tenant, or to be substituted in his place.⁴ In ejectment, the cause of action survives on the death of a party.⁵

§ 4492. **Affidavit for Substitution by Assignee of Plaintiff.**

Form No. 1100.

[TITLE.]

[VENUE.]

E. F., being duly sworn, deposes and says:

I. That on or about the day of, 18 . . ., one A. B. commenced an action in this court against one C. D. for [here state the cause of action]; that issue was joined therein by the service and filing of the defendant's answer on the day of, 18 . . .; that said cause is upon the calendar of this court awaiting trial.

II. That on the day of, 18 . . ., and while said action was still pending, said A. B., plaintiff in said action, duly assigned and transferred the [promissory note] in the complaint mentioned, for a valuable consideration, to affiant, who

¹ Cal. Code C. P., sec. 385.

Barstow v. Newman, 34 Id. 90; Moss

² Taylor v. W. P. R. R. Co., 45 Cal. 337.

v. Shear, 30 Id. 467.

⁴ Mastick v. Thorp, 29 Cal. 446.

⁵ Camarillo v. Fenlon, 49 Cal. 202;

⁶ Barrett v. Birge, 50 Cal. 655.

is now the owner and holder thereof [or sold and conveyed to affiant all his right, title, and interest in and to the real property in controversy in this action, and that affiant is now the owner thereof].

Wherefore affiant prays that he may be substituted as plaintiff in said action in place of said A. B., and that said action may be continued in his name, and that he may have such other relief as may be just.

[JURAT.]

[SIGNATURE.]

§ 4493. **Bankruptcy.**—The bankruptcy of a party against whom a judgment has been rendered, though adjudicated before appeal taken, will not prevent the prosecution of the appeal in his name. The appeal may be prosecuted either in the name of the bankrupt or of his assignee.¹

§ 4494. **Transfer of Interest.**—That clause of section 121 of the New York code, which provides that in case of “any other” transfer of interest the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action, contemplates a transfer other than by death—contemplates an existing, pending action, and the substitution of one person in the place of another.² After the issues in a cause are all made up, a person claiming to be assignee of a cause of action may be substituted as plaintiff, and if so substituted, need not file a supplemental complaint;³ he takes the place of the original plaintiff, who ceases to be a party to the suit.⁴ Where a person claiming to be assignee of a cause of action is substituted as plaintiff, and the cause proceeds and a judgment is rendered in his name, it is too late to object in the appellate court that he did not file a supplemental complaint showing his interest.⁵

§ 4495. **Affidavit by Husband after Marriage of Female Plaintiff to Continue Cause in Joint Names of Husband and Wife.**

Form No. 1101.

[TITLE.]

[VENUE.]

I. [As in form 1100.]

II. That pending said action, and on the . . . day of . . . , 18 . . . , the said A. B. was married to this affiant E. F., who thereby became, and now is, a necessary party plaintiff herein, as he is advised and believes.

¹ O'Neil v. Dougherty, 46 Cal. 573.

² Kissam v. Hamilton, 20 How. Pr. 369; but see Cal. Code C. P., sec. 385.

³ Virgin v. Brubaker, 4 Nev. 31.

⁴ Id.

⁵ Id.

Wherefore affiant prays the order of this court that said action may be continued by said A. B. and this affiant jointly as plaintiffs, against said C. D., and that they may have leave to amend the complaint as they may be advised, and such other relief as may be just.¹

[JURAT.]

[SIGNATURE.]

§ 4496. Order by Consent Substituting Administrator as Plaintiff, without Prejudice to Proceedings.

Form No. 1102.

[TITLE.]

On reading and filing the affidavit of E. F., showing the death of A. B., the plaintiff in the above-entitled action, and the granting of letters of administration to P. Q., by the probate court of the county of, and on motion of E. F., the plaintiff's attorney, the defendant's attorney consenting thereto:

It is ordered that this action be and the same is hereby revived and continued in the name of the said P. Q., administrator of the estate of A. B., deceased, as plaintiff; and that the said administrator be and he is hereby substituted as plaintiff in the place and stead of the said A. B., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.²

[DATE.]

[SIGNATURE.]

§ 4497. Death, Effect of.—If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on real estate, but must be paid in due course of administration.³ In such case, however, it is error to move for new trial or to take appeal, without suggesting the death and bringing in the representative of the deceased, of which such representative must be notified.⁴ If such representative is substituted on motion of the adverse party, but no notice is given to him, nor does he appear, and the deceased is named in the judgment, the executor is not affected by it, and the judgment as to him is a nullity.⁵ The death of the wife without issue

¹ See Cal. Code C. P., secs. 370, 385. In the practice, where the names of the parties to an action have to be changed, it is usually done by suggestion or stipulation only; for in the case of the death of one of the parties, or marriage of one of them, the labor of drawing up formal affidavits and petitions is by our practice generally dispensed with.

² For petition, consent, and order for the substitution as plaintiff of the successor in trust of a deceased plaintiff, see *Emerson v. Bleakley*, 5 Abb. Pr., N. S., 350.

³ Cal. Code C. P., sec. 669.

⁴ *Judson v. Love*, 35 Cal. 463; *Shartzer v. Love*, 40 Id. 93.

⁵ *McCreery v. Everding*, 44 Cal. 284.

after suit brought by herself and husband for the homestead defeats a recovery by the husband, though the right to recover existed at the commencement of the suit.¹

§ 4498. **Partition.**—In a suit in chancery for partition, one of the defendants died after the bill had been taken as confessed as against him. The suit was prosecuted to judgment without bringing in his heirs (who were not parties to the suit), and after sale under the judgment and delivery of the master's deed, an order was made reviving the suit against his heirs, who thereafter made application to the court in relation to the disposition of the proceeds: it was held that the heirs were not bound by the decree. By the death of their ancestor the action became defective, and the title which he had at the time of his death could not be affected without bringing in those who succeeded to his interests.²

§ 4499. **Practice.**—The death of a party *pendente lite* should be made known by suggestion of that fact to the court, and the action continued by order of the court against the representative of the party deceased, of which he must be duly notified before he can be affected by further proceedings in the action.³ Where, in an action by J. against L. and others, L. died after verdict rendered for defendants, and thereafter J. moved for a new trial, without suggestion made of the death of L., or a substitute of his successor in interest, and appealed from the judgment rendered on the verdict, and an order denying a new trial, it is held that all said proceedings, except the rendition of judgment upon said verdict, were void, and that the appeal as to L. should be dismissed.⁴ Where a party litigant dies after a verdict, the authority of the attorney to act for him is thereby determined, and he can neither give nor receive notice of motion for new trial or appeal.⁵

§ 4500. **Order Conclusive.**—An order of revivor, in the name of A. "as executor" of a deceased plaintiff, standing in full force at the time of the trial, is conclusive to show that the action has been properly revived, and that A. can recover all that the testator might have recovered.⁶

¹ Gee v. Moore, 14 Cal. 472.

² Randall v. Mumford, 18 Ves. 424; Story's Eq. Pl., secs. 329, 331, 354, 369; Hind's Ch. Pr. 46; Kelly v. Hooper, 3 Yerg. 395; Garr v. Gomez, 9 Wend. 649; Mandeville v. Riggs, 2 Pet. 482, 487.

³ Judson v. Love, 35 Cal. 463.

⁴ Id.

⁵ Id.

⁶ Underhill v. Crawford, 29 Barb. 664; S. C., 18 How. Pr. 112.

§ 4501. Affidavit by Defendant to have Plaintiff's Executor Substituted.

Form No. 1103.

[TITLE.]

[VENUE.]

S. T., being duly sworn, deposes and says, I am the defendant in the above-entitled action:

I. That on or about the day of, 18.., the above-named A. B. commenced an action in this court against this affiant, for [state cause of the action and condition, as in form 1100, and if defendant has asked affirmative relief in his answer, set it forth].

II. That affiant is informed and believes that A. B., the above-named plaintiff, died on or about the day of last, having first made and published his last will and testament in due form of law, by which, among other things, he appointed P. Q. his executor; that said will has been duly admitted to probate in the probate court of the county of, and letters testamentary issued to the said P. Q., on the day of, A. D. 18.., and he has duly qualified and entered upon his duties as such executor, but to the best of affiant's information and belief, has hitherto failed to make any application to have the above-entitled action continued by him as plaintiff.

Wherefore affiant prays that the above-entitled action may be continued in the name of said executor, or that the complaint herein be dismissed, or for such other order as may be just.

[JURAT.]

[SIGNATURE.]

§ 4502. Notice of Motion on Behalf of Defendant for Substitution of Plaintiff's Executor.

Form No. 1104.

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the papers on file in this cause, the undersigned will move the court, at the court-room thereof, at, on the day of, 18.., at the hour of in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the above-entitled action to be continued by P. Q., as executor of the last will and testament of [or administrator of the estate of] C. D., plaintiff above named, deceased, in the place of said deceased plaintiff.

[DATE.]

[SIGNATURE.]

§ 4503. **Order of Substitution.***Form No. 1105.*

[TITLE.]

On reading and filing the affidavit of J. R., dated the day of, and the pleadings in this action, and proof of due service of notice of this motion, and on motion of S. T., counsel for defendant, and after hearing G. H., of counsel for said P. Q., executor of A. B., the deceased plaintiff.

It is ordered [etc., as in No. 1102].¹

[DATE.]

[SIGNATURE.]

§ 4504. **Substitution of Papers.**—If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.²

§ 4505. **Affidavit for Supplying the Place of a Lost Pleading.**

Form No. 1106.

[TITLE.]

[VENUE.]

I. On the day of, 18..., a complaint was filed in the above-named court, in this action, of which the following is a true copy.

II. That the said original complaint has been lost or mislaid, and that after the search made by the clerk of the said court, the same can not be found.

III. That this affiant does not know where the said original complaint now is.

§ 4506. **Lost Pleading.**—If a pleading be lost, it can only be supplied by motion based on affidavits showing what the lost pleading contained; and a service of personal notice of motion on the opposite party must be sufficiently explicit in form to enable him to controvert the affidavits submitted.³ Substitution of pleadings or papers in a case is always within the discretion of the court;⁴ and no notice of the motion to apply for it need be given when the notice of it can be of no use.⁵

¹ In case this order is made without notice, as it often is in practice, the form should be varied accordingly, and the executor notified of its entry; which is generally done by serving a copy of the order on him.

² California Code of Civil Procedure, sec. 1045.

³ *People v. Cazalis*, 27 Cal. 522.

⁴ *Benedict v. Cozzens*, 4 Cal. 381.

⁵ *Id.*

CHAPTER VI.

INTERVENTION, INTERPLEADER, ETC.

§ 4507. **Intervention.**—Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.¹ The order allowing an intervention may be made *ex parte*.² Whatever its form, it seems that under the statute the plea of an intervenor is now called a complaint. It can not be filed without leave of the court, and prudence would suggest that it should appear that leave was obtained. If the petition is insufficient as to facts, the objection can be taken at any time.³

§ 4508. **Commencement of Complaint by Intervenor.***Form No. 1107.*

[TITLE.]

Now comes R. S., and by leave of the court first had and obtained, files this as his complaint in intervention in the above-entitled cause, and as the grounds of his intervention alleges [state facts showing the right to intervene, and set forth cause of action or defense as in ordinary complaint or answer].

[DEMAND FOR RELIEF.]

[VERIFICATION.]

§ 4509. **Order Allowing Intervention.***Form No. 1108.*

The foregoing complaint in intervention having been this day presented to me in open court, and leave asked to file the same by E. F., attorney for R. S., the intervenor named therein, it appearing that good cause exists therefor, it is ordered that

¹ Cal. Code C. P., sec. 387.² Spanagel v. Reay, 47 Cal. 608.³ Harlan v. Eureka M. Co., 10 Nev. 92.

leave be and is hereby granted to file the same, and that said R. S. be permitted to intervene in said cause.¹

[DATE.]

[SIGNATURE OF JUDGE.]

§ 4510. **Appeal.**—The right of an intervenor to take an appeal is immediate upon the sustaining of an objection, by demurrer, to his right to intervene.² If pleadings in intervention are filed in the court below without objection, and the parties go to trial without objecting, they can not afterwards on appeal raise the objection that it was irregular and erroneous to permit an intervention.³

§ 4511. **Assignees.**—An assignee *pendente lite* of part of the subject-matter of the controversy may be brought in.⁴ An assignee in bankruptcy or insolvency, but only on his own application,⁵ and an assignee applying to be made defendant in an action for conversion of property, must show some right thereto.⁶ If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment.⁷ Where parties succeed to the interest of the defendant in the premises, after the commencement of the action, and before answer filed, they may be allowed to defend.⁸

§ 4512. **Attachment Suits.**—In an attachment suit, judgment creditors of defendant may intervene to set aside the attachment, because void as to them.⁹ In an action to recover money on which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment, for the purpose of contesting the validity of the first attachment.¹⁰ And the allegations in the pleading, on the part of the intervenor, traversing the complaint, have the same effect as denials in the answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor.¹¹ Subsequent attaching creditors may intervene in a suit of the prior attaching creditor and the common debtor,

¹ The above form is drawn to be appended to the complaint in intervention, but the order may be entered as a minute order, in which case it can be modified accordingly.

² Stich v. Dickinson, Goldner Intervenor, 38 Cal. 608.

³ McKenty v. Gladwin, 10 Cal. 227; Smith v. Penny, 44 Id. 161.

⁴ McGown v. Leavenworth, 2 E. D. Smith, 24.

⁵ Cleveland v. Boerum, 3 Abb. Pr. 294.

⁶ Gunther v. Greenfield, 8 Abb. Pr., N. S., 191.

⁷ Gradwohl v. Harris, 29 Cal. 150.

⁸ McFadden v. Wallace, 38 Cal. 51.

⁹ Davis v. Eppinger, 18 Cal. 378.

¹⁰ Speyer v. Umels, 21 Cal. 280.

¹¹ Id.

when they allege that there is nothing due to said first creditor, and that the object is to hinder, delay, and defraud other creditors.¹ The intervenors become defendants, and as they allege that the plaintiff is not entitled to recover, it amounts to a denial of the facts set forth in the complaint, and consequently the *onus probandi* is on the plaintiff; and if he fails to prove his case, even though the real defendants have made default, judgment will be given in favor of the intervenors against him, and in his favor against the real defendants.² Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims.³

§ 4513. **Dismissal.**—Where plaintiffs brought suit to foreclose a lien, and other parties intervened as lien claimants, and after an appearance by the defendants plaintiff filed a dismissal of the suit, it was held that the dismissal could not affect the rights of the intervenors, and they had a right to an adjudication as between themselves and the defendants.⁴ Nonsuit of plaintiff is not a dismissal as to an intervenor, whose intervention defendant has answered.⁵ A motion to dismiss an intervention should point out the precise ground on which it is made.⁶

§ 4514. **Ejectment.**—In ejectment, a person who is no way connected with the right of possession asserted by the plaintiff or the defendant, but on the contrary, alleges title in himself paramount to both, can not intervene.⁷ If, however, plaintiff and the intervenor agree upon the facts, and stipulate that the claim of the intervenor shall be determined upon the legal effect of the stipulated facts, plaintiff can not afterwards object that the case is not a proper one for intervention.⁸

§ 4515. **Foreclosure.**—A simple contract creditor of a common debtor can not intervene in a foreclosure suit. But judgment creditors, being as such subsequent incumbrancers, may intervene; and a court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention.⁹ In a suit on a note and mort-

¹ Speyer v. Ihmels, 21 Cal. 280.

² Id.

³ Coghill v. Marks, 29 Cal. 673; but see Dixey v. Pollock, 8 Id. 570.

⁴ Elliott v. Ivers, 6 Nev. 287.

⁵ Poehlmann v. Kennedy, 48 Cal. 201.

⁶ Poehlman v. Kennedy, 48 Cal. 201.

⁷ Porter v. Garrissino, 51 Cal. 559.

⁸ Donner v. Palmer, 51 Cal. 629.

⁹ Horn v. Volcano Water Co., 13

gage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors can not prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice.¹ In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene.²

§ 4516. **Interest of Parties.**—The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.³ To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.⁴

§ 4517. **Mechanic's Lien.**—In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And when the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused.⁵ The filing of an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time, and becoming parties to the suit during the existence of the lien, is the same as commencing an original action.⁶

§ 4518. **Nonsuit.**—Where the intervenor claims an interest adverse to both plaintiff and defendant, and plaintiff answers the intervention raising material issues, his right to be heard thereon is not affected by nonsuit granted on motion of defendant. The action is still pending as to such issues, and should be tried, not dismissed.⁷

§ 4519. **Ordering in Necessary Parties.**—When a complete determination of the controversy can not be had without the presence of other parties, the court must order them to be

¹ Horn v. Volcano Water Co., 13 Cal. 62.

² Sargent v. Wilson, 5 Cal. 504; Marks v. Marsh, 9 Id. 96; Moss v. Warner, 10 Id. 296.

³ Horn v. Volcano Water Co., 13 Cal. 62; Harlan v. Eureka M. Co., 10 Nev. 92.

⁴ Horn v. Volcano Water Co., 13 Cal. 70; cited in Stich v. Dickinson, 38 Id. 608; Brooks v. Hager, 5 Id. 281.

⁵ Hocker v. Kelley, 14 Cal. 164.

⁶ Mars v. McKay, 14 Cal. 127.

⁷ Poehlmann v. Kennedy, 48 Cal. 201.

brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.¹ The court may, on its own motion, order in necessary parties;² but will not, on motion of defendant and against the will of plaintiff, bring in other parties unless their presence is necessary.³ And if the plaintiff chooses to waive any relief which would render the presence of other parties necessary, and take judgment for that only to which he is entitled as against defendants already in court, and as to which a complete determination can be had, the court may award the latter relief without the addition of other parties.⁴ The phrase "when a complete determination," etc., means that there are persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.⁵ As a court of equity will not permit litigation by piecemeal, and as the whole subject-matter and all the parties should be before it, to determine once and forever their respective claims, the court will order them to be brought in.⁶ And it is the imperative duty of the court in such case to order the parties in,⁷ although such parties be non-residents.⁸

§ 4520. **Specific Performance.**—In an action against several for a specific performance of their joint contract to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, the court will not proceed unless all parties are in.⁹

§ 4521. **Sureties.**—Sureties may be let in to defend upon proper application, in the place of their principal.¹⁰ But if a party who has given a bond of indemnity to a sheriff takes charge of the defense in an action against the sheriff and defends it by his own attorney, though done in the sheriff's name, the judgment against the sheriff is conclusive against the party giving the bond; as he might have intervened and defended as party to the record, had he so chosen, and did as a party in interest.¹¹

¹ Cal. Code C. P., sec. 389; see also N. Y. Code, sec. 452; and Stats. Oregon, sec. 40; 1 Van Santv. Eq. Pr. 121.

² Settembre v. Putnam, 30 Cal. 490; see also Grain v. Aldrich, 38 Id. 514.

³ Sawyer v. Chambers, 11 Abb. Pr. 110.

⁴ Settembre v. Putnam, *supra*.

⁵ McMahon v. Allen, 12 How. Pr. 39.

⁶ Wilson v. Lassen, 5 Cal. 114; Ord

v. McKee, Id. 515; Shaver v. Brainard, 29 Barb. 25.

⁷ Tonnelle v. Hall, 3 Abb. Pr. 205; Davis v. Mayor of N. Y., 2 Duer, 663; but see same case, 14 N. Y. 506.

⁸ Sturtevant v. Brewer, 17 How. Pr. 571; S. C., 9 Abb. Pr. 414.

⁹ Powell v. Finch, 5 Duer, 666.

¹⁰ Jewett v. Crane, 13 Abb. Pr. 97; 35 Barb. 208.

¹¹ Dutil v. Pacheco, 21 Cal. 441.

§ 4522. **Tax.**—A. & Co. having on general deposit with B. & Co. seventy-five thousand dollars, a tax for county purposes was levied thereon, and payment demanded of both A. & Co. and B. & Co.: it was held that the county might intervene in an action concerning the money to recover said tax.¹

§ 4523. **Who may Intervene.**—Where one tenant in common sues to recover possession of the premises, and the damages sustained by the ouster, his co-tenants can not intervene.² Persons who ought to have been joined as parties, but who were not, may apply to come in, and if there are no laches on their part, may apply to come in at any time before final judgment.³ A judgment creditor of a deceased person is not entitled to be made a party to a suit in partition between his heirs and those entitled to his real property.⁴ Where a man brought suit to annul a second marriage on the ground that he had a former wife living, and obtained a decree for want of an answer, and then married a third wife; and subsequently the second wife opened the judgment against her marriage on the ground of fraud; and then the third wife was allowed to intervene, and she put in an answer alleging the invalidity of both former marriages and the validity of her own: it was held that both such former marriages could not be adjudged void without an amendment to the complaint.⁵

§ 4524. **Order to Bring in Necessary Parties, without Motion.**

Form No. 1109.

[TITLE.]

I. This cause coming on to be tried, and it appearing to the court that S. T. is a necessary party to a complete determination of the controversy:

II. It is ordered that the summons and complaint in this action be amended by the addition of S. T. as a defendant therein; that the plaintiff cause the said S. T. to be duly served with a copy of the said summons and complaint, further amended as he may be advised, within days from the date of this order; that the said S. T. have days to answer the complaint, after such service; and that the trial of this cause be postponed until the expiration of said days allowed the said S. T. to answer as aforesaid.

§ 4525. **Interpleader.**—A defendant against whom an ac-

¹ Yuba Co. v. Adams, 7 Cal. 37.

³ Hubbard v. Eames, 22 Barb. 597.

² Donner v. Palmer, Bradley Intervenor, Cal. Sup. Ct., Oct. Term, 1867 (not reported).

⁴ Waring v. Waring, 3 Abb. Pr. 246.

⁵ Anon., 15 Abb. Pr., N. S., 171.

tion is pending upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order.¹ The granting of the order is within the discretion of the court.² But it should not be granted where the action is for the price of goods sold, on the ground that a third person claimed to be the owner of the goods,³ even though such third person claimed that the goods had been procured from him by fraud.⁴ But where defendant alleged that he had been sued by a third person, claiming that the plaintiff sold the goods as his agent, whereas the plaintiff claimed that he sold them in his own right, it was held a proper case to order that defendant be discharged on paying the money into court, and that such third person be substituted as defendant.⁵

§ 4526. **Affidavit in Action to Recover Money.**

Form No. 1110.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That the said action has been commenced and is now pending in this court, against the above-named defendant, on a contract; and that the said defendant has not yet answered therein, and his time to do so does not expire until the . . . day of . . . next.

III. That said action is brought to recover the sum of . . . dollars, deposited with said defendant on or about the . . . day of . . . , 18.., by one A. B.; and that the plaintiff claims to be entitled to said moneys so deposited, under an assignment thereof to him by the said A. B.

IV. That on the . . . day of . . . , 18.., one M. N. gave to said defendant notice that the said moneys had been assigned to him, A. B., and demanded of said defendant that they pay

¹ Cal. Code C. P., sec. 386; N. Y. Code, sec. 820.

² Barry v. Mutual Life Ins. Co. of N. Y., 53 N. Y. 536.

³ Sherman v. Partridge, 4 Duer, 646..

⁴ Trigg v. Hitz, 17 Abb. Pr. 436.

⁵ Johnston v. Lewis, 4 Abb. Pr., N. S., 150.

the said deposit to him; which demand was made without any collusion with the defendant. And this deponent further says that he is not acquainted with the respective merits of said claims, and does not know to which of said parties he can safely pay said money; but hereby offers to pay the same into court, upon being discharged from liability to either of them, in order that said several claimants may interplead, and settle their claims between themselves.

[JURAT.]

[SIGNATURE.]

§ 4527. Affidavit where Action is Brought to Recover Specific Personal Property.

Form No. 1111.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That the complaint therein was served on him on the day of 18., at, and no answer has yet been filed.

III. That the property which is claimed by the plaintiff herein was delivered to this deponent for storage by one O. P., of, subject to his order.

IV. That the same property is claimed by one Q. R., of, under a written order of the said O. P., dated on the day of, 18., and directing its delivery to him as the alleged purchaser thereof; while the plaintiff herein claims under a general assignment of all the property of the said O. P. to him, executed by the said O. P. on the same day.

V. That the defendant is ignorant of the rights of the respective claimants, and is not acting in collusion with either of them.

VI. That the defendant is ready and willing to deliver the said property to such person as the court may direct, upon being discharged from liability to either of the said claimants.

[JURAT.]

[SIGNATURE.]

§ 4528. Notice of Motion to Allow Party to Interplead.

Form No. 1112.

[TITLE.]

Take notice that on the affidavit herewith served, and on the complaint herein, the defendant will move the court, at the court-room thereof, at, on the day of, 18., at o'clock in the noon, or as soon thereafter as counsel can be heard, to substitute M. N., of, in his

place, as defendant herein, and to discharge this defendant from liability to either the plaintiff or the said M. N., concerning [designate the contract], mentioned in the complaint, upon this defendant's paying into court the sum of dollars, the amount claimed in the summons herein [or if the action is for specific property, say, concerning the property mentioned in the complaint, upon said defendant's transferring the same to such person as the court may direct]; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

§ 4529. **Order of Interpleader.***Form No. 1113.*

On reading and filing the affidavit of C. D., and upon proof of due service of notice of this motion, and on motion of G. H., for C. D., and after hearing E. F. in opposition:

It is ordered that on payment by the defendant to the clerk of the county of of the amount claimed in the summons herein, principal and interest, within five days from the date of this order, Q. R. be substituted as defendant in this action in place of C. D., the defendant above named, and that said C. D. thereupon be discharged from liability to either the plaintiff above named or said Q. R. And it is further ordered that if the said Q. R. does not appear and defend this action within days after service upon him of a copy of this order, together with a copy of the summons and complaint herein, the plaintiff may apply for an order that the money so deposited be paid over to him.

§ 4530. **Petition by Landlord to be Made Defendant in Action of Ejectment.***Form No. 1114.*

[TITLE.]

The petition of M. N. respectfully shows to this court:

I. That an action is now pending in this court by A. B., plaintiff, against C. D., defendant, for the recovery of the possession of certain real property, situated in the county of, and more particularly described in the complaint in said action; which action your petitioner is informed and believes is at issue and upon the calendar of this court, awaiting trial.

II. That said C. D. occupies said premises as tenant of your petitioner, and not otherwise. That your petitioner claims in good faith to be the owner in fee simple of said premises [here briefly indicate title].

Wherefore your petitioner prays that he may be made a party

defendant in said action, and may be allowed to defend the same, and that he may have such other relief as may be just.¹

[DATE.]

[SIGNATURE.]

[Verification.]

§ 4531. Notice of Motion to Make Party Defendant.

Form No. 1115.

[TITLE.]

[ADDRESS.]

Please take notice that on the annexed petition, and on the papers on file in this action, the undersigned will move the court, at the court-room thereof, at, on the day of, 18.., at o'clock in thenoon, or as soon thereafter as counsel can be heard, for an order directing M. N., the petitioner above named, to be made a party defendant in the action now pending in this court between A. B., plaintiff, and C. D., defendant, and for such other relief as may be just.

[DATE.]

[SIGNATURE.]

§ 4532. Order Making Third Person a Party Defendant.

Form No. 1116.

[TITLE.]

On reading and filing the petition [or affidavit] of S. T., dated the day of, 18.., and proof of due service of notice of this motion, and on motion of E. F. for said S. T., and after hearing G. H. in opposition:

It is ordered that S. T. be made a party defendant in said action, and that the summons and complaint be amended accordingly; and that S. T. cause notice of appearance for himself herein to be given to plaintiff's attorney within days from the entry of this order, and a copy of the complaint as amended served upon his attorney, and that the cause thereupon proceed as if said S. T. had been originally a party defendant therein.

¹ Where a tenant finds that there are claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the case: *McDevitt v. Sullivan*, 8 Cal. 592; *McCoy v. Bateman*, 8 Nev. 126. In

an action to determine the title or right of possession to real property, which at the time of the commencement of the action is in the possession of a tenant, the landlord may be joined as a party defendant: Cal. Code C. P., sec. 379.

CHAPTER VII.

SUPPLEMENTAL PLEADINGS.

§ 4533. **In General.**—In California, the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.¹ The New York code² permits also a statement of facts in a supplemental pleading, of which the party was ignorant at the time the original pleading was made. Facts, however, which existed at the commencement of the action, but which were then unknown to the pleader, but afterward came to his knowledge, were always proper to be alleged in an amended pleading. The above section of the New York code also includes among the matters which may be alleged in a supplemental pleading “the judgment or decree of a competent court, rendered after the commencement of the action, determining the matters in controversy, or a part thereof.” Such matters could doubtless be pleaded under the comprehensive language of the California code. In New York the party may have leave to make the supplemental pleading either in addition to his former pleading or in place of it. In New York³ it was held that supplemental pleading was not a right, but depended upon the discretion of the court. By the amendment of 1877, the words “and in a proper case must” were inserted in section 544 after the words “the court may.” In California, though the right may rest in the discretion of the court, and an order granting or refusing leave to file is not appealable, yet it is an “intermediate order,” which may be reviewed on appeal.⁴ At common law the right of the defendant to avail himself of matters of defense, arising after the commencement of the suit, was as ample, perhaps, as under the code. But the plaintiff had no corresponding right. In courts of equity, however, the plaintiff could avail himself of matters arising after the filing of the bill by a supplemental bill;⁵ at law, matters of defense arising after the commencement of the suit, but before plea or continuance was pleaded, not in bar of the suit generally, but to the further maintenance of the suit. If the matter of defense arose after plea pleaded or issue

¹ Cal. Code C. P., sec. 464.

² Sec. 544 (1877).

³ *Medbury v. Swan*, 46 N. Y. 200; *Holyoke v. Adams*, 59 Id. 233.

Code C. P., sec. 956.

⁵ See Story's Eq. Pl., c. 8.

joined, it was then *puis darrein continuance*.¹ Such plea is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had, and may be either in bar of the further prosecution of the suit or in abatement.² Whether the former answer is wholly superseded by a supplemental one must depend on its form and the circumstances of the case, since inconsistent defenses may be pleaded under the code.

§ 4534. Notice of Motion for Leave to File Supplemental Complaint.

Form No. 1117.

[TITLE.]

[ADDRESS.]

Please take notice that upon the affidavit and copy of supplemental complaint herewith served, and upon all the proceedings on file in this action, the undersigned will move the court, at the court-room thereof, at, on the day of, at the hour of o'clock in thenoon, or as soon thereafter as counsel can be heard, for leave to file and serve such supplemental complaint in this action, and for such other relief as may be just.

[DATE.]

[SIGNATURE.]³

§ 4535. Effect of Supplemental Pleading.—The legislature, in allowing supplemental complaints and answers, intended to follow the former chancery rule, and thus chose terms which import something additional or amendatory to what has gone before.⁴ It is, therefore, not allowable to a defendant, as a general rule, without special permission, to answer anew, or further the original complaint.⁵ Leave to file the supplemental complaint does not establish the plaintiff's right to sue for the original cause of action, and decides nothing as to the plaintiff's rights.⁶ A new cause of action can not be set up by supplemental complaint. Matter must be consistent with and in aid of original proceeding.⁷ Nor can the nature of the plaintiff's claim be changed,⁸ or the rights of a substituted defendant enlarged, so as to enable him to traverse a fact submitted by his predecessor.⁹

§ 4536. Fraud, as Ground for.—The discovery of fraud after filing the original bill against the assignee of a debtor may

¹ 1 Ch. Pl. 689.

² Stephen's Pl. 98.

³ For the rules as to forms and sufficiency of supplemental bills, see *Chateau v. Rice*, 1 Minn. 106.

⁴ See *Slauson v. Englehart*, 34 Barb. 198.

⁵ *Dann v. Baker*, 12 How. Pr. 521.

⁶ *Robbins v. Wells*, 25 How. Pr. 15.

⁷ *Wattson v. Thibou*, 17 Abb. Pr. 184; *Cordier v. Cordier*, 26 How. Pr. 187.

⁸ *Cheeseman v. Sturges*, 19 Alb. Pr. 293.

⁹ *Forbes v. Waller*, 25 N. Y. 430.

be added to the original bill by a supplemental complaint, without bringing in all the other creditors.¹ Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution, and the plaintiff subsequently filed a supplemental bill, setting forth that in the mean time he had become a judgment creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to plaintiff's judgment, it was held that it is no objection to the supplemental bill that it prays for a different relief, and fails to bring in all the other creditors who are alleged by the defense to be entitled to a ratable distribution.² The *gravamen* of both bills is the indebtedness, and every supplemental bill is enlarged or altered by every additional and pertinent fact, and the plaintiff has the right to attack the assignment for fraud discovered since filing his original bill.³ Material facts which existed at the commencement of the action, but were not known or discovered by the party until after his complaint or answer was filed, are proper to be alleged in an amended pleading, but not in a supplemental pleading in California. It is otherwise in New York.⁴

§ 4537. **Motion, when may be Made.**—Circumstances occurring subsequently to filing an answer, materially affecting the rights of the respective parties, to the advantage of the defendant, should be embodied in a supplemental answer to authorize evidence of them without the plaintiff's consent.⁵ Such facts can not be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action.⁶ So when a female subsequently marries, her husband must be joined with her, and this should be done, and an averment of the marriage should be made, by supplemental pleading, and not by amendment to the original.⁷ In New York it was held that the filing of a supplemental complaint against the executor of a deceased defendant is a matter of right, and that leave of the court need not and ought not to be obtained, though more than a

¹ Truebody v. Jacobson, 2 Cal. 269; Baker v. Bartol, 6 Id. 483; Mattoon v. Eder, Id. 61; Davis v. Robinson, 10 Id. 412.

² Baker v. Bartol, 6 Cal. 483.

³ Id.

⁴ See N. Y. Code, sec. 544 (1877).

⁵ Van Maren v. Johnson, 15 Cal. 308; Moss v. Shear, 30 Id. 472; 1

Van Santv. Pl. 378; 2 Barb. Ch. Pr. 635; Stafford v. Howlett, 1 Paige Ch. 200; Hornfager v. Hornfager, 1 Code R., N. S., 180.

⁶ Van Maren v. Johnson, 15 Cal. 308.

⁷ Van Maren v. Johnson, 15 Cal. 311.

year has elapsed.¹ Leave, however, was refused by a general term of the superior court, in a case where the original complaint was fatally defective.² Neither a purchaser at sheriff's sale, as such, nor a redemptioner, either before or after redemption, nor an assignee of the sheriff's certificate of sale, upon his own *ex parte* motion made in his own name, is entitled to have the judgment upon which the execution or order of sale issued, vacated, and himself substituted as plaintiff, in order that he may file a supplemental complaint to bring in other parties.³

§ 4538. **May be Amended.**—A supplemental complaint may be once amended of course, and a new cause of action set up by the amendment.⁴

§ 4539. **Affidavit on Motion to File Supplemental Complaint.**

Form No. 1118.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff in the above-entitled action; that said action was commenced in this court on the day of, 18..., by the filing of the complaint with the clerk of this court, and the issuing of a summons thereon; that thereafter, on the day of, 18..., a copy of the summons, and copy of the complaint therein, was served upon the defendant.

II. That the action is brought for the purpose of [state the object of action].

III. That issue has been joined therein, and the cause is now upon the calendar of this court for trial.

IV. That he has read the annexed proposed supplemental complaint, and that the facts therein stated are true, of his own knowledge.

V. That said facts did not come to the knowledge of this deponent, nor had he any information thereof, until after the service of the original complaint herein, to wit, on or about the day of, 18...

[JURAT.]

[SIGNATURE.]⁵

¹ *Bornsdorff v. Lord*, In re, 41 Barb. 211; S. C., 17 Abb. Pr. 168; *Roach v. La Farge*, 43 Barb. 616; S. C., 19 Abb. Pr. 67.

² *Robbins v. Wells*, 26 How. Pr. 15; S. C., 18 Abb. Pr. 191.

³ *Abadie v. Lobero*, 36 Cal. 390.

⁴ *Divine v. Duncan*, 52 How. Pr. 446.

⁵ If the motion has not been noticed for hearing promptly upon the discovery of the facts, the affidavit should excuse the delay by showing why it was not made sooner. If it appear that the adverse party has not been prejudiced by the delay, the motion should be granted, though the excuse be not satisfactory, upon the princi-

§ 4540. Order Granting Leave to File Supplemental Complaint.

Form No. 1119.

[TITLE.]

On reading and filing [designate motion papers], and on motion of E. F., attorney for the plaintiff, and after hearing G. H., attorney for the defendant:

It is ordered that the plaintiff have leave to serve on defendant, within days after this date, a copy of the supplemental complaint filed upon this motion [on payment of dollars costs to the defendant].

[DATE.]

[SIGNATURE.]

§ 4541. Affidavit on Motion to File Supplemental Answer.

Form No. 1120.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. That he is the defendant in the above-entitled action.

II. That said action was commenced on the day of, 18..; that issue was joined therein by the serving and filing of this defendant's answer, on the day of, 18.., and this cause is now upon the trial calendar of this court.

III. And this deponent further says that this action is brought [here state purpose of suit]; that since the joining of the issue, to wit, on the day of, 18.., this defendant paid to the plaintiff the sum of dollars, in full payment of the note mentioned in the complaint, and of the costs up to that day, accrued herein.

[JURAT.]

[SIGNATURE.]

§ 4542. Order Granting Leave to File Supplemental Answer.

Form No. 1121.

[TITLE.]

On reading and filing [designate motion papers], and on motion of G. H., attorney for defendant, and no one appearing in opposition:

It is ordered that the defendant be allowed to file a supplemental answer herein, setting up [state nature of defense], such answer to be served upon the attorney for the plaintiff, within days from the entry of this order.

[DATE.]

[SIGNATURE.]¹

ple that the neglect of any party, if not wholly unreasonable, should not deprive him of a legal right unless injustice to the other party would be the result.

better practice to prepare and present the supplemental answer to the court on the hearing of the motion, and to serve a copy of the same with the notice of motion.

¹ Though not essential, it is the

§ 4543. **After Reversal.**—Where the circuit court, after a reversal of their decree, further proceedings being awarded, allowed a supplemental answer, to bring before the court the facts which were proper to be known before instructions were given to a master as to the mode of settling the accounts, it was held that under the circumstances this was proper, and no objection could be taken to it on a subsequent appeal.¹

§ 4544. **Discharge.**—Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment *puis darrein continuance*.²

§ 4545. **Foreclosure.**—A supplemental answer to a bill of foreclosure should embrace new matter discovered subsequent to the filing of the original answer. But this is a matter of discretion with the court, who will not enforce the rule so as to work injustice.³

§ 4546. **Judgment.**—Where, after answer has been served, setting up the pendency of another action, judgment has been rendered therein, the proper course to make evidence of such judgment admissible is to obtain leave to serve a supplemental answer alleging the fact.⁴

§ 4547. **Parties.**—The objection, if it be one, that there is a misjoinder of parties plaintiff, owing to the matters which have occurred pending the action, must be taken by a supplemental answer, or it is waived.⁵

§ 4548. **Title Acquired.**—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact can not be introduced, unless it is pleaded as a defense in a supplemental answer.⁶ In actions to recover lands, title acquired by defendants *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*.⁷

§ 4549. **Title of Plaintiff Terminated.**—The defendant can not prove, on the trial of an action of ejectment, for the purpose of showing that plaintiff's right of possession has terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such

¹ Williams v. Gibbes, 20 How. U. S. 535.

² Jessup v. King, 4 Cal. 331.

³ Suydam v. Truesdale, 6 McLean, 450.

⁴ N. Y. Code (1877), sec. 544; Drought v. Curtiss, 8 How. Pr. 56.

⁵ Calderwood v. Peyser, 31 Cal. 333.

⁶ McMinn v. O'Connor, 27 Cal. 246.

⁷ Moss v. Shear, 30 Cal. 468.

conveyance has been set up in the original or a supplemental answer.¹

§ 4550. **When Allowed.**—Where a defendant has answered generally to a matter of which he has no particular knowledge, he may be allowed to file a supplemental answer on the same subject after he has acquired particular information concerning it, and to introduce into such answer new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it.² Leave will not be given to set up by supplemental answer matter not constituting a defense.³ And the answer proposed must be true, and must contain a good defense, or leave will be refused; and its truth may be inquired into on motion.⁴ Leave should be obtained by motion, on affidavit and notice, before trial.⁵ Fifteen months' delay is a good ground for refusing leave to set up a discharge in bankruptcy.⁶ But leave was allowed nine months after judgment by default where the attorney's misapprehension caused the delay.⁷ Where new facts amount to entire satisfaction, it is the duty of the court to allow the motion without reference to the question of laches.⁸

CHAPTER VIII.

SUBSEQUENT PLEADINGS.

§ 4551. **Cross-complaint.**—Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or, by permission of the court, subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto, as to the original complaint.⁹ The line of distinction between cross-complaints and counter-claims is not very clear. New matter, if it constitutes a defense or counter-claim, may be pleaded in an answer,

¹ Moss v. Shear, 30 Cal. 468; Mc-Minn v. O'Connor, 27 Id. 246.

² Caster v. Wood, 1 Baldw. 289.

³ Betz v. Betz, 19 Abb. Pr. 90.

⁴ Morel v. Garely, 16 Abb. Pr. 269.

⁵ Garner v. Hannah, 6 Duer, 262; see Lyon v. Isett, 11 Abb. Pr., N. S.,

353; Hopkins v. Mason, 42 How. Pr. 155.

⁶ Medbury v. Swan, 46 N. Y. 200.

⁷ Hadley v. Boehm, 1 Hun, 304.

⁸ Drought v. Curtiss, 8 How. Pr. 56.

⁹ Cal. Code C. P., sec. 442.

though the counter-claim must be distinct from the answer, and show a cause of action against the plaintiff.¹ Under subdivision 2 of section 438, California code of civil procedure, in an action arising upon contract, the counter-claim may be any other cause of action arising upon contract, and existing at the commencement of the action. This subdivision is wholly distinct from a cross-complaint. The first subdivision of section 438, however, seems to be very nearly allied to section 442, relating to cross-complaints. Under subdivision 1 of section 438, the counter-claim may be "a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." The distinction between counter-claims and cross-complaints would be of little importance, were it not for the fact that no answer or replication is required to a counter-claim, while a cross-complaint must be answered.

Section 442, California code of civil procedure, was not embraced in the practice act, which preceded it, but which permitted the subject-matter of a cross-complaint, which might entitle a defendant to relief against the plaintiff alone, or against the plaintiff and a co-defendant, to be set up in the answer.² Such matter in an answer required a reply, or the same was deemed admitted.³ So far as known, in the California practice, prior to the adoption of the code, cross-complaints, as such, were permitted, in analogy to the former cross-bill in chancery; nor does this provision of the code materially change or enlarge the right or remedy of the defendant, except that it may be invoked in a case where the plaintiff's cause of action is at law, as well as where it is in equity, and this as well by virtue of the general provision abolishing the distinctions between actions at law and suits in equity, as by force of the section under consideration. This section is therefore mainly useful in giving a name to this particular pleading, and prescribing the time and manner of pleading it, and for the underlying principles we must look to the former practice at law and in equity. Under the former practice, a defendant in chancery could not pray anything in his answer, except to be dismissed from the court; and hence, if he wished to pray any relief, or if he sought a discovery, he was compelled to file a bill of his own, entitled a cross-bill.⁴ It would only lie touching the matters in the original bill;⁵ and whenever it is brought against co-defendants

¹ Quinn v. Smith, 49 Cal. 165.

² Laws of 1865-6, p. 702, sec. 2, amending sec. 46 of the practice act.

³ Herold v. Smith, 34 Cal. 124.

⁴ Barbour's Ch. Pr., book 4, p. 126.

⁵ Mitf. Eq. Pl. 81.

in a suit, the complainant must be named a defendant together with them.¹ A cross-bill is generally considered as a defense, and the original cause and the cross-bill are but one cause. It is so effectual as a defense, that if a cross-bill is taken as confessed, it may be used as evidence against the complainant in the original suit on the hearing, and will have the same effect as if he had admitted the facts in an answer.²

Strictly speaking, a set-off or counter-claim is not a defense. It does not go to defeat the plaintiff's cause of action, but when allowed, the counter-claim or set-off becomes an equitable payment, and the opposing claims, so far as they equal each other, are deemed satisfied, and but one judgment is rendered, that being for the difference in amounts, and in favor of the party entitled thereto, whether plaintiff or defendant. If such balance is in favor of the defendant, or indeed, if his counter-claim be allowed, whether greater than the plaintiff's claim or not, the relief he obtains is affirmative, though in a substantial rather than in a technical sense. The same result is reached as though separate actions had been prosecuted to final judgment, and the judgments were set off against each other.

§ 4552. **Distinctions between Counter-claim and Cross-complaint.**—There are, however, some distinguishing features between counter-claims arising under subdivision 1 of section 438, and cross-complaints under section 442, of the California code of civil procedure: 1. When the defendant's claim, if allowed, is against the plaintiff, and goes in reduction or discharge of the plaintiff's demand, or results in a simple money judgment against the plaintiff, it is properly the subject of a counter-claim and not of a cross-complaint. 2. If the relief sought by a defendant be against other defendants, who are proper parties to a full and final determination of the matters alleged in the complaint, or against the plaintiff and one or more of the defendants, it must be by cross-complaint. 3. Though the relief sought by defendant be against the plaintiff alone, yet if that relief can not result directly in a simple money judgment, which may be applied in reduction or extinguishment of the plaintiff's claim or demand, but in other affirmative relief, as an injunction, unless the defendant's right thereto appears from the complaint,³ or the cancellation of an agreement

¹ Cooper's Eq. Pl. 85; Barbour's Ch. Pr., *supra*. will lie, consult the authorities collated in 2 Barbour's Ch. Pr., 2d rev.

² White v. Buloid, 2 Paige Ch. 164. ed., p. 482.

As to the cases in which a cross-bill ³Thursby v. Mills, 1 Code R. 83.

in an action to enforce specific performance,¹ or for the purpose, in some cases, of obtaining an equitable set-off,² and generally, where the defendant is entitled to some positive relief, beyond what the complainant's bill will afford him,³ a cross-complaint must be filed. So, also, a cross-complaint will lie against a plaintiff for a money demand, where the plaintiff seeks other and different relief concerning the subject of the action; as where the maker of a note brings an action to cancel it, on any grounds entitling him to such relief, the payee or indorsee may, in addition to his answer, file a cross-complaint, and recover a judgment against the plaintiff upon the note. In such case it is evident that if separate actions had been brought, several judgments in favor of the respective plaintiffs could not have been rendered; nor could such several judgments be off-set against each other if it were possible to obtain them.

In New York, cross-complaints are not provided for by any enactment of the code. It neither authorizes nor prohibits them. A defendant, however, may have affirmative relief against the plaintiff alone if he claim it by his answer.⁴ But where a defendant is entitled to relief against the plaintiff and other defendants, or against other defendants, a cross-complaint or cross-suit is necessary.⁵ In Ohio, cross-complaints (petitions) are permitted, under section 84 of the code; but a formal pleading seems not to be necessary. The defendant may claim such relief in his answer, and if, on inspection of the answer, it shall be found to contain a prayer for judgment, and the necessary averments to show the defendant's right to relief under the proceedings instituted against him, the court will not require the filing of a cross-petition in form, but will treat such answer as equivalent to a petition of that kind, and grant whatever relief the party may show himself entitled to receive.⁶ In the United States courts, the filing of a cross-bill without the leave of the court is an irregularity, and the same may be properly set aside.⁷

§ 4553. **Nature of Relief.**—The relief sought by a cross-complaint, under section 442, California code of civil procedure, must be affirmative, and must relate to or depend upon the

¹ *McCrackan v. Ware*, 3 Sandf. 688.

² *Cartwright v. Clark*, 4 Met. 104.

³ *Schwarz v. Sears*, Walk. Ch. 170.

⁴ *Van Santv. Eq. Pr.* 266.

⁵ *Id.*, 224; *Thursby v. Mills*, 1 Code R. 83; *Tracy v. N. Y. Steam Faucet Co.*, 1 E. D. Smith, 349; *McCrackan v. Ware*, 3 Sandf. 688.

⁶ *Klonne v. Bradstreet*, 7 Ohio St. 322. See also, upon the subject of cross-complaints, code of Oregon, sec. 71; Arizona, sec. 46; Wash. Ter., sec. 58; Idaho, sec. 46.

⁷ *Bronson v. La Crosse R. R. Co.*, 2 Wall. 283.

contract or transaction upon which the action is brought, or affect the property to which the action relates. The language of this section is broader than subdivision 1 of section 438. Under that section, in an action to quiet title to lands, the cause of action stated in the complaint was that the defendant claimed some estate or interest in the premises, of which the plaintiff averred himself to be in possession. Defendant's answer stated facts essential to a complaint in ejectment against the plaintiff, and demanded possession. Plaintiff, when the cause was called for trial, moved to dismiss the action, which was opposed upon the ground that the answer contained a counter-claim. The supreme court held, upon appeal from the order refusing to dismiss the action, that the "subject of the action" was the adverse claim or interest set up by the defendants, and that the answer contained neither a statement of a cause of action arising out of the transaction set forth in the complaint, nor one connected with the subject of the action, in the sense of the statute.¹ This question arose under the first subdivision of section 581 (prior to the amendment of 1878), which provides that the plaintiff may dismiss the action at any time before trial, upon the payment of costs, if a counter-claim has not been made; but it serves to point a distinction between the words "the subject of the action," in section 438, and the words "or affecting the property to which the action relates," in section 442.² In special cases, it may require consideration to determine correctly whether a counter-claim or a cross-complaint should be interposed. While the code permits a defendant to plead as many defenses as he may have, even though they are not consistent, it was certainly not the intention that the same matter should be pleaded in several different ways, all tending to the same result. It may occur, however, that facts pleaded in an answer are necessary to be repeated in a counter-claim or cross-complaint, in order to the statement of the cause of action in such counter-claim or cross-complaint; but the same matter or cause of action should not be pleaded both as a counter-claim and a cross-complaint. In New York it has been held that if a defendant sets up a counter-claim in his answer, and also files a cross-complaint for the same cause of action, he may be compelled, on motion, to elect on which he will rely.³ Or a reference may be ordered to ascertain whether the cross-complaint is for the same cause as

¹ Moyle v. Porter, 51 Cal. 639.

² See also James v. Center, 53 Cal. 31, where it was held that judgment of dismissal might be entered, notwith-

standing a cross-complaint filed by defendant.

³ Fabricotti v. Launitz, 1 Code R., N. S., 121; Hammond v. Baker, Id. 105.

the counter-claim; and if the report is in the affirmative, the plaintiff may have an order dismissing the cross-action.¹

§ 4554. **Averments.**—A cross-complaint must state all the facts which would be required in an original complaint, to entitle the party pleading it to affirmative relief, and it can not be aided by the averment of any other pleading in the action.² To entitle the defendant to set up a claim to relief, by way of cross-petition, it is not necessary that the answer should contain a denial of the allegations of the petition, or that the answer should contain any statement of new matter.³

§ 4555. **Form and Mode of Pleading.**—Under the Ohio practice, the cross-petition is or may be contained in the answer, and it would seem without any formal designation of it as such.⁴ In California the usual practice is, at the conclusion of the matter pleaded by way of answer, to state, "And the defendant, A. B., by way of cross-complaint against the plaintiff, alleges," etc., the signature of the attorneys and verification following at the end of the whole pleading. In such case the verification should be that "he has read the foregoing answer and cross-complaint, and that the same and each of them are true," etc. The better mode of pleading is to conclude and verify the answer, and prepare the cross-complaint as a separate pleading. If the cross-complaint seeks relief against co-defendants alone, or against the plaintiff and one or more defendants, it is eminently proper that it should be a separate pleading, as it must be served on all the parties affected by it, and it is not necessary to serve with it a copy of the answer. When filed after the answer, it must be by leave of court, and should aver that it is so filed, though that is not essential, as it will so appear by the minutes of the court. It seems to be essential that the name "cross-complaint" be given to this pleading, or at least that it should not be misnamed. Where a defendant styled his pleading a "counter-claim," and not a "cross-complaint," he will not be permitted in the appellate court to say for the first time that it was a cross-complaint, and that he was entitled to a judgment because its allegations were not denied.⁵ So where matters which are proper matters of defense are pleaded as such, they will be regarded only in that light, notwithstanding a prayer for relief at the conclusion. To constitute a cross-complaint, the facts constituting the cause of complaint must

¹ Farmers' Loan and Trust Co. v. Hunt, 1 Code R., N. S., 1.

² Collins v. Bartlett, 44 Cal. 381; Kreichbaum v. Melton, 49 Id. 55.

³ Bradford v. Andrews, 20 Ohio St. 208.

⁴ Klonne v. Bradstreet, 7 Ohio St. 322.

⁵ McAbee v. Randall, 41 Cal. 137.

be separately stated as a cause of action against the plaintiff, and not as a defense to the plaintiff's cause of action.¹

§ 4556. **Parties.**—Relief, under a cross-complaint, may be had against any party, or parties, to the action, if it relates to or depends upon the contract or transaction upon which the action is brought, or affects the property to which the action relates.² It is a general rule that a cross-bill can not be filed by any person not a party to the original suit, yet it has been held that a purchaser *pendente lite* from a party to the suit is a privy, and may file a bill in the nature of a cross-bill, to make himself a party to the suit, so as to have his rights protected.³ It is said, however, in *Shields v. Barrow*, 17 How. U. S. 45, that new parties can not be introduced into a cause by a cross-bill. The liberal provisions of the codes in regard to new parties, substitution of parties, and intervention will in most cases remove all difficulties in regard to proper parties to a cross-complaint. In analogy to relief prayed by the plaintiff in his complaint, which will be refused unless proper parties are made, a cross-complaint will not be entertained where the relief sought would affect the rights of persons not made parties to it.⁴

§ 4557. **Service of.**—Section 442, California code of civil procedure, provides that "the cross-complaint must be served upon the parties affected thereby." Section 1015 provides that in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorneys, instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

§ 4558. **Demurrer to Answer and Cross-complaint.**—The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counter-claims set up in the answer.⁵ Demurrer may be taken upon one or more of the following grounds: 1. That several causes of counter-claim have been improperly joined; 2. That the answer does not state facts sufficient to constitute a defense or counter-claim; 3. That the

¹ *Doyle v. Franklin*, 40 Cal. 110; and see *Blum v. Robertson*, 24 Id. 141; *Jones v. Jones*, 38 Id. 585.

² Cal. Code C. P., sec. 442.

³ *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Jones v. Smith*, 14 Ill. 229.

⁴ *Bibb v. Wilson*, 31 Miss. 624

⁵ Cal. Code C. P., sec. 443; see N. Y. Code, sec. 494; Laws of Oregon, sec. 76; see also *Demurrer*, vol. ii., sec. 3068 et seq.

answer is ambiguous, unintelligible, or uncertain.¹ Demurrer to cross-complaint may be made same as to original complaint.²

§ 4559. Demurrer to Answer.

Form No. 1122.

[TITLE.]

The plaintiff demurs to the answer of the defendant [or the first or other defense or counter-claim contained in the answer of the defendant], for insufficiency, in not stating facts sufficient to constitute a defense [or counter-claim, or state other statutory ground].

§ 4560. Demurrer, when Lies.—Demurrer will lie to a bill called a “cross-bill,” if it is not really so;³ or to a supplemental pleading;⁴ or to an amended answer, just as if it were an original one. The rule is well settled that the amended pleading takes the place of and supersedes the original one.⁵ A demurrer will not lie to an amended answer, amended by leave of the court, in plaintiff’s presence, but objection should be raised at the time of application for the amendment.⁶ A brief statement appended to the general issue is but a notice, requiring no answer, and is not, therefore, the subject of a demurrer.⁷ Where amendments are made to a plea, and it is still insufficient, the plaintiff should demurr.⁸ Where a plea in its commencement professes to answer the whole action, but answers only a part, it is bad on general demurrer.⁹ Under the New York code, section 494, demurrer to answer seems to lie only in regard to new matter contained therein, and many decisions turn on the question as to whether or not the matter pointed out is new matter. Such decisions are inapplicable to California. Hypothetical averments are not demurrable on that ground.¹⁰ Demurrer will not lie for an omission to answer an allegation of the complaint;¹¹ or in respect of wholly immaterial matter;¹² unless immaterial matter forms part of a defense, otherwise insufficient, and is relied on as a bar.¹³

¹ Cal. Code C. P., sec. 444.

² Id., sec. 442; see also N. Y. Code, sec. 495. See, as to motion to strike out, *ante*, “Amendments.”

³ Moss v. Anglo-Egyptian Navigation Co., L. R., 1 Ch., 108.

⁴ Goddard v. Benson, 15 Abb. Pr. 191.

⁵ Van Santv. Pl. 795; Sands v. Calkins, 30 How. Pr. 1.

⁶ Therasson v. Peterson, 22 How. Pr. 98.

⁷ Leslie v. Harlow, 18 N. H. 518.

⁸ Cox v. Capron, 10 Mo. 691.

⁹ Weimer v. Shelton, 7 Mo. 237; Thumb v. Walrath, 6 How. Pr. 196.

¹⁰ Taylor v. Richards, 9 Bosw. 679. For objections which require consideration of the court and to be substantiated by argument, see Littlejohn v. Greeley, 22 How. Pr. 345; S. C., 13 Abb. Pr. 311.

¹¹ Smith v. Greenin, 2 Sandf. 702.

¹² Newman v. Otto, 4 Sandf. 668; Matthews v. Beach, 5 Id. 256.

¹³ Fry v. Bennett, 5 Sandf. 54; Ayres v. Covill, 18 Barb. 260.

§ 4561. **Effect of Demurrer.**—A general demurrer to a plea confesses all the facts in the plea, if they are well pleaded;¹ but not the soundness of the conclusions of law.² Where the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true.³ A demurrer to an answer to a petition for a writ of mandate is an admission of the truth of matters averred in the answer.⁴

§ 4562. **Grounds for Demurrer.**—A demurrer to an answer must state the grounds.⁵ Objections to an inadmissible counter-claim or set-off may be taken by demurrer.⁶ Demurrer lies to an insufficient defense,⁷ or insufficiently pleaded.⁸ Mere irrelevancy is no ground for demurrer.⁹ A plea that defendant is civilly dead is open to demurrer.¹⁰ An objection that the plea amounts to the general issue can only be taken advantage of by a special demurrer.¹¹

§ 4563. **Waiver by Failure to Demur.**—Failure of plaintiff to demur waives the objection.¹² Omission to demur to counter-claims has the same effect as omission to demur to complaint.¹³ Where a party sets up matter in his answer not recognized by law as a defense to the action, the objection is not waived by failure of plaintiff to demur, but may be taken advantage of at any time.¹⁴ Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, it was held that the appellate court would not decide upon the demurrer. The point was waived by filing the amended rejoinder.¹⁵ Where a case is tried on the theory that the answer presents a sufficient denial to the allegations of the complaint, the objection to the sufficiency of such denials can not be raised for the first time on appeal.¹⁶

¹ *Washington and Balt. Tpk. Road v. State*, 19 Md. 239; *Lyon v. O'Kell*, 14 Iowa, 233.

² *Branham v. San Jose*, 24 Cal. 585.

³ *Freeman v. Frank*, 10 Abb. Pr. 370.

⁴ *Middleton v. Low*, 30 Cal. 596.

⁵ *Ketcham v. Zerega*, 1 E. D. Smith, 554.

⁶ *Merritt v. Millard*, 5 Bosw. 645; *Sands v. Calkins*, 30 How. Pr. 1.

⁷ *Merritt v. Millard*, 5 Bosw. 645; *Merchants' Bank of New Haven v. Bliss*, 21 How. Pr. 365; *S. C.*, 13 Abb. Pr. 225; *Schermerhorn v. Gouge*, Id. 315.

⁸ *Arthur v. Brooks*, 14 Barb. 533; *Smith v. Countryman*, 30 N. Y. 655.

⁹ *Watson v. Husson*, 1 Duer, 242.

¹⁰ *Freeman v. Frank*, 10 Abb. Pr. 370.

¹¹ *Swearingen v. Knox*, 10 Mo. 31. *Hotchkiss v. Ladd*, 36 Vt. 593.

¹² *Ritchie v. Davis*, 5 Cal. 453; *White v. Spencer*, 4 Kern. 248; *N. Y. Central Ins. Co. v. Nat. Pro. Ins. Co.*, Id. 85.

¹³ *Ayres v. O'Farrell*, 10 Bosw. 143.

¹⁴ *Macdougall v. Maguire*, 35 Cal. 274; *Case v. Maxey*, 6 Id. 276.

¹⁵ *United States v. Boyd*, 5 How. U. S. 29.

¹⁶ *White v. S. R. & S. Q. R. R. Co.*, 50 Cal. 417; see also *King v. Davis*, 34 Id. 106.

§ 4564. **What Demurrer should Show.**—The demurrer should show to which of several defenses it is interposed. Where, however, a demurrer to an answer containing two defenses, one of which was good and the other bad, purported to be the whole answer, but it was evident from the assignment of grounds of the demurrer that it had reference to the second defense only, it was held that it was not error, under the liberal mode of construing pleadings enjoined by the code, to construe it as being substantially limited to the badly pleaded defense, and to render judgment allowing it accordingly.¹

§ 4565. **Replication.**—Under the California code of civil procedure, no reply to new matter in the answer, or to a counter-claim, is required; but such matter must, on the trial, be deemed controverted by the opposite party.² But in New York, Ohio, Wisconsin, and other states, new matter, pleaded either as a defense or as a counter-claim, requires a reply. Such is certainly the more rational mode of pleading. In view of the practice in those states where a replication is required or permitted, we retain in this revision the forms and notes under the above title. The answer to a cross-complaint does not differ from an answer to an original complaint, either in form or substance, and the pleader is referred to that portion of the work treating of answers in general.

§ 4566. **Reply to Counter-claim.**

Form No. 1123.

[TITLE.]

The plaintiff replies to the counter-claim contained in the answer of the defendant [or the first or other counter-claim contained in the answer of the defendant].

I. That, etc. [denying as in an answer].

§ 4567. **Chancery Practice.**—In general, if the complainant in a bill in chancery does not file a general replication to the answer of the defendants, the answer is to be taken as true, and no evidence can be given by the complainant to contradict it.³ After a cause was set for hearing, on bill and answer, and reference to the auditor directed, the plaintiff was allowed to file a general replication.⁴ A replication to a plea in chancery is an admission of its sufficiency as a defense.⁵

§ 4568. **Conclusion.**—A replication containing new matter should conclude with a verification, and not to the country.⁶

¹ *Matthews v. Beach*, 8 N. Y. 173.

² See sec. 462.

³ *Gallagher v. Roberts*, 1 Wash. C. C. 320; *Pierce v. West*, Pet. C. C. 351.

⁴ *Pierce v. West*, Pet. C. C. 351.

⁵ *Hughes v. Blake*, 6 Wheat. 453; affirming S. C., 1 Mason, 515.

⁶ *Hallett v. Slidell*, 11 Johns. 53; *Hanna v. Rust*, 21 Wend. 149.

But if it states no new matter, it may conclude to the country.¹ A replication at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, frequently occurs in practice; and on account of conciseness should, when practicable, be adopted.² If the plea answers the matter which is the gist of the action, it is sufficient.³ In an action of debt against devisees, a replication of assets by descent may conclude with a verification.⁴

§ 4569. **Counter-claim of Defendant.**—A counter-claim is in the nature of a complaint in a cross-action. If it is a demand for damages for converting property, it is not necessary for the plaintiff to put in a reply denying the amount of value, or the allegation of damage. These must be proved on an assessment, although the plaintiff puts in no reply.⁵ And defendant is entitled to only nominal damages, unless he prove substantial damage.⁶ A reply merely denying that the defendant is entitled to any sum admits the facts set up, as in counter-claim.⁷ The plaintiff's complaint contained eight counts in the common form; the defendant's answer denied generally all the allegations of the complaint, and set up a counter-claim; the plaintiff's reply contained, among other things, a counter-claim to the defendant's counter-claim, and the defendants moved to strike out this portion of the reply: it was held that defendants had mistaken their remedy; they should have demurred. Whether such reply is good, *quære*.⁸

§ 4570. **Form.**—A replication which is merely a denial is not special.⁹ Where the defendant pleads a record of the same court, the replication of *nul tiel record* concludes with a verification, and a day is given to the parties to have judgment; if the plea be of a record of another court, the replication may either conclude by giving the defendant a day to bring in the record, or with an averment, and prayer of debt and damages; in which latter case, there must be a rejoinder reasserting the existence of the record.¹⁰

§ 4571. **When not Permitted.**—A reply can not be permitted where no counter-claim is interposed by the answer.

¹ Bindon v. Robinson, 1 Johns. 516; Patcher v. Sprague, 2 Id. 462.

² 1 Ch. Pl. 592; 2 T. R. 442.

³ Andrus v. Waring, 20 Johns. 153; see also Snider v. Croy, 2 Id. 428.

⁴ Labagh v. Cantine, 13 Johns. 272.

⁵ Connos v. Meir, 2 E. D. Smith, 314.

⁶ McKensie v. Farrell, 4 Bosw. 192; Merritt v. Millard, 5 Id. 645.

⁷ McKensie v. Farrell, 4 Bosw. 192.

⁸ Stewart v. Travis, 10 How. Pr. 148.

⁹ Manhattan Co. v. Miller, 2 Cai. 60.

¹⁰ Bobyshall v. Oppenheimer, 4 Wash. C. C. 388.

New matter which does not constitute a counter-claim is to be deemed controverted.¹ Under the statute of California, the affirmative allegations of the answer stand controverted by the plaintiff; the burden being on the defendant to prove their truth, rendering a reply unnecessary.² And a counter-claim, or matter in avoidance, set up in an answer, need not be denied by plaintiff to put defendant upon his proof.³ In Pennsylvania, where the replication puts in issue the averments of the answer, it throws upon the defendants the burden of sustaining them.⁴

§ 4572. **General Denial of New Matter.**

Form No. 1124.

[TITLE.]

The plaintiff replies to the answer of the defendant:

I. That he denies each and every allegation contained in the [second] defense.

II. [Or, as to the (second) defense, by way of counter-claim set forth in the answer, he denies each and every allegation therein.]

§ 4573. **Special Denial.**

Form No. 1125.

[TITLE.]

The plaintiff replies to the answer of the defendant:

That he denies [here insert the particular allegation denied].

§ 4574. **Sufficient Reply.**—If an answer alleges mere matters of evidence, a replication traversing the ultimate and issuable fact which the answer was intended to aver is sufficient.⁵

§ 4575. **Reply Interposing both Denial and New Matter.**

Form No. 1126.

[TITLE.]

The plaintiff replies to the answer of the defendant herein:

First. For a first reply to the [first] counter-claim:

He denies each and every allegation of the answer respecting the same.

Second. For a second reply to said counter-claim he alleges:

That at the time alleged in the complaint as the time of making the supposed note therein mentioned, this plaintiff was under the age of twenty-one years, to wit, of the age of years.

§ 4576. **Practice in California.**—In California, there is no such practice as pleading a counter-claim to a counter-claim. But the plaintiff may have the benefit of a counter-claim to de-

¹ Devlin v. Bevins, 22 How. Pr. 290; see Bissell v. Pearse, 21 Id. 130.

² Bryan v. Maume, 28 Cal. 238.

³ Herold v. Smith, 34 Cal. 122.

⁴ Naglee's Estate, 52 Pa. St. 154.

⁵ Moore v. Murdock, 26 Cal. 514.

fendant's counter-claim without pleading it, as he has no opportunity of doing so.¹ In Indiana, if the defendant pleads a counter-claim in his answer, the plaintiff may reply a counter-claim to it.² The replication may introduce new matter to explain and fortify the complaint without a departure.³ It has been held, in the United States circuit court, that the practice now is, where the plaintiff finds it necessary, from the answer, to prove new matter, to amend the bill. Nevertheless, if a special replication containing the essential qualities of a general replication is filed, denying all the material parts of the answer, and also charging new matter, it will be considered as surplusage at the hearing.⁴ A departure in pleading is not allowed in equity. If the answer requires a new case to be made, it can not be done in the replication, but must be by an amendment to the bill.⁵

§ 4577. **To Plea of Bankruptcy.**—A replication setting forth, in the words of the act, all the grounds on which a discharge would be void by the act is bad; it must specify the particular fraud relied on.⁶

§ 4578. **To Plea in Bar.**—Though in England a court of law protects the title of an equitable owner of a chose in action, sued on in the name of the legal owner, by refusing to receive a plea which is in fraud of his rights, yet they will not allow these rights to be shown by way of replication to what is a good plea in bar of the action of the plaintiff, nor admit them to be relied on at the trial. The law of the United States courts is otherwise; and the proper practice is to reply the equitable title and notice thereof to the defendant, and thus show the asserted bar to be in fraud of his rights; and when thus shown, the bar is adjudged insufficient.⁷

§ 4579. **To Plea of Former Recovery.**—Plaintiff replied *protestando* that in a former action two trespasses had been joined in the same count, and the court, on notice, compelled him to elect for which he would proceed, and that he should not go for both; and that the jury found damages accordingly: it was held that the former recovery was no bar, but the repli-

¹ Hart v. Cooper, 47 Cal. 78. Whether a plaintiff may interpose in his reply a counter-claim to the counter-claim of the defendant, compare Miller v. Losee, 9 How. Pr. 356; Stewart v. Travis, 10 Id. 148.

² House v. McKinney, 54 Ind. 240.

³ Hallett v. Slidell, 11 Johns. 56.

⁴ Dupont v. Mussy, 4 Wash. C. C. 128.

⁵ Vattier v. Hinde, 7 Pet. 252.

⁶ Service v. Heermance, 2 Johns. 96.

⁷ L'Invincible, 1 Wheat. 233; Corser v. Craig, 1 Wash. C. C. 424; Briggs v. Darr, 19 Johns. 95; Warren v. Emerson, 1 Curt. C. C. 239; Brown v. Hartford Ins. Co., 11 Law Rep., N. S., 726.

cation was bad, as being argumentative instead of traversing and denying the former recovery.¹ A replication to a plea of a former recovery that the evidence was wholly insufficient to establish the claim, or that no evidence was offered or received by the court, will not avoid the bar.²

§ 4580. **To Plea of Fraud.**—In an action on a note the plea was that the note was given by the defendant to the plaintiff in payment for land which the defendant had been induced to buy of him by his false and fraudulent representations that he was the owner of it: it was held that fraud was the material allegation, and a replication denying the fraudulent representation was a perfect answer.³ If the maker of a note pleads a set-off, and that the paper was fraudulently transferred to the plaintiff to prevent the set-off, a replication merely alleging legal title admits the fraudulent transfer and the set-off.⁴

§ 4581. **To Plea of Judgment.**—If a defendant pleads judgment and no assets *ultra*, replication thereto may either be *nul tiel record*, or assets *ultra*, or *per fraudem*, or other matter of facts; and such replications are probably triable by jury.⁵ If the plea avers that the promise sued on was a promise to pay the debt of another, to wit, B., a replication that the promise was not a promise to pay the debt of said B. is good.⁶

§ 4582. **To Plea of Justification.**—A replication neither answering nor aiding the matter of a special plea of justification is bad.⁷ In trespass, where the defendant pleads in justification a simple reference to a statute, the plaintiff must reply *de injuria propria*.⁸ The general replication *de injuria sua propria absque tali causa* is bad when the defendant insists on a right, and is good only when he insists on matter of excuse.⁹ In a plea justifying an arrest under process, an allegation of its loss, by way of an excuse for not producing it, does not turn the justification into matter of excuse;¹⁰ and a replication may protest the warrant, and conclude *de injuria*, etc.¹¹ The general replication *de injuria* to a plea of *mollitur manus imposuit* puts in issue every material allegation, including the reasonableness of the force, and the plaintiff may recover, if an excess of force is shown.¹²

¹ Snider v. Croy, 2 Johns. 227.

² Ramsey v. Herndon, 1 McLean, 450.

³ Bradner v. Demick, 20 Johns. 404.

⁴ Savage v. Davis, 7 Wend. 223.

⁵ Teasdale v. Brantons, 2 Hayw. 377.

⁶ Hotchkiss v. Ladd, 36 Vt. 593.

⁷ Foshay v. Riche, 2 Hill, 247.

⁸ Comly v. Lockwood, 15 Johns. 188.

⁹ Cooper v. Monke, Will. 54; Jones v. Kitchin, 1 Bos. & Pul. 76; Lytle v. Lee, 5 Johns. 112; Plumb v. M'Crea, 12 Id. 491; Allen v. Crofoot, 7 Cow. 46; Griswold v. Sedgwick, 1 Wend. 126; Tubbs v. Caswell, 8 Id. 129.

¹⁰ Coburn v. Hopkins, 4 Wend. 577.

¹¹ Stickle v. Richmond, 1 Hill, 77.

¹² Bennett v. Appleton, 25 Wend. 371.

§ 4583. **To Plea of Payment.**—When the answer in a suit on a bill of exchange sets up payment, part in money and the residue in bills of exchange, which, it is averred, were received by the plaintiff in payment, a replication which simply avers the non-payment of the bills and the insolvency of the drawers and drawees at their maturity, tenders an immaterial issue, and the finding should be for the defendant, upon the pleading.¹ Reply is unnecessary to an answer pleading merely payment.² An answer, for a defense, for the demand sued for, averred that the defendant had paid certain sums to plaintiff, and concluded with a notice that defendant would insist on the sums so paid as a counter-claim, and a demand for judgment: it was held that this did not set up a counter-claim, but the facts pleaded amounted to the defense of payment only, and therefore no reply was necessary.³

§ 4584. **To Plea of Performance.**—A replication to a plea of general performance, in an action on a bond, should assign a special breach. An omission to do so must be taken advantage of by demurrer, and is cured by verdict.⁴

§ 4585. **To a Plea of Privilege by an Attorney,** it is a good replication that for a year he had ceased to practice.⁵

§ 4586. **To a Plea of Usury.**—The plaintiff may reply that it was not corruptly agreed, in manner and form, etc., without a traverse, and with a conclusion to the country.⁶

§ 4587. **Reply of Statute of Limitations,**

Form No. 1127.

[TITLE.]

The plaintiff replies to the answer herein:

That the said cause of action alleged for a counter claim [or demand alleged as a set-off] in said answer did not accrue at any time within years next before the commencement of this action.

§ 4588. **Facts must be Alleged.**—Where the statute of limitations is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, he must, in his replication, or by an amendment to his bill, set forth the facts specially.⁷

¹ Frisbee v. Lindley, 23 Ind. 511.

² Brackett v. Wilkinson, 13 How. Pr. 102.

³ Burke v. Thorn, 44 Barb. 363.

⁴ Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46-70.

⁵ Brooks v. Patterson, Col. & C. Cas. 133.

⁶ Buynham v. Matthews, 2 Stra. 871; Waterman v. Haskin, 7 Johns. 283.

⁷ Miller v. McIntyre, 6 Pet. 61; affirming S. C., 1 McLean, 85; Piatt v. Vattier, 9 Pet. 405; Taylor v. Benham, 5 How. U. S. 233; Marsteller v. McClean, 7 Cranch. 156.

§ 4589. **Facts must be Traversed.**—In the correct order of pleading, it is necessary that the facts of the plea should be traversed by the replication, unless matters in avoidance be set up. It is not sufficient that the facts alleged in the replication are inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.¹

§ 4590. **Fraud as a Reply.**—Fraud is a sufficient answer to the plea of the statute of limitations; and if the defendant fraudulently seized the notes, he is not only estopped from setting up the statute, but it would begin to run only from the discovery of the fraud.²

§ 4591. **Insufficient Reply.**—A replication to a plea of the statute of limitations that the plaintiff lives in another state, there being no such exception in the statute, is bad.³ To a plea of the statute of limitations, it is not a good replication that a suit for the same demand was commenced in a court in another state, and discontinued within six years.⁴ When the plea avers that the cause of action mentioned in the declaration did not, nor did either of them, accrue within six years, a replication which alleges that said causes of action, or some of them, did accrue within six years, is bad for uncertainty.⁵ A replication of a new promise by the executor, to his plea of the statute of limitations to a count on the promise of the testator, is bad for departure.⁶ In general, a replication must not depart from any material allegation in the complaint; yet, where there is an evasive plea, the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, so as to meet and thwart the particular defense set up.⁷

§ 4592. **Promissory Note.**—Where, in an action on a promissory note, brought under the code of 1848, the defendant pleaded the statute of limitations, and the plaintiff replied, merely denying the plea, it was held that evidence of a new promise was admissible under the reply.⁸ Where, in an action by an executor upon notes due to his testator by the defendant, who, it was alleged, had fraudulently seized them after the death of the testator, the defendant pleaded the statute of limitations, after the commencement of the trial, and it was evident that the fraudulent seizure was the plaintiff's answer to the plea, it was

¹ United States v. Buford, 3 Pet. 12; Jones v. Hays, 4 McLean, 521.

² Bricker v. Lightner's Executor, 40 Pa. St. 199.

³ Jones v. Hays, 4 McLean, 521.

⁴ Delaplaine v. Crowninshield, 3 Mason, 329.

⁵ Hotchkiss v. Ladd, 36 Vt. 593.

⁶ Benjamin v. De Groot, 1 Denio,

151.

⁷ 1 Ch. Pl. 603; Troup v. Smith, 20 Johns. 33.

⁸ Esselstyn v. Weeks, 2 Abb. Pr. 272.

held that the want of a formal replication was not cause for reversing the judgment.¹

§ 4593. **Demurrer to Reply.**

Form No. 1128

[TITLE.]

The defendant demurs to the plaintiff's reply [or first or other reply], for insufficiency, in not stating facts sufficient to constitute a reply.

§ 4594. **Rejoinder, its Office.**—A rejoinder must answer the replication, and tender an issue on a single point. If it is double, it is demurrable.² A rejoinder is bad which avers several distinct answers to the replication, or puts matter of law in issue to the jury.³ A rejoinder must maintain the plea, and can not set forth matter at variance with it.⁴ After pleading that the plaintiff was not damnified, the defendant can not rejoin confessing and avoiding the action,⁵ by setting up a personal discharge. So one defendant, having joined with the others in a plea in bar, can not afterwards interpose a rejoinder going to his personal discharge.⁶

§ 4595. **Breach of Agreement.**—A replication, in an action of covenant on an agreement to build, was held bad for traversing immaterial time and place, and introducing averments of performance before made in the declaration.⁷ To a declaration for a breach of agreement to bid at auction up to a certain limit, the defendant pleaded that the property was sold for more: it was held that a reply of fraud in the defendant in allowing the property to be sold for the greater amount was no departure.⁸

§ 4596. **Conversion.**—A declaration alleged that the defendants wrongfully took certain goods. The replication averred that the taking was by a sheriff, at the instance and by the direction of the defendants: it was held that these was no departure.⁹

§ 4597. **Demurrer to Reply.**—The reply of the plaintiff stated that he was himself the receiver mentioned in the answer, and that he was the holder and owner of the note, as such receiver, and that he sought to recover upon it in that capacity, and not individually. The defendant demurred to the reply,

¹ *Bricker v. Lightner's Executor*, 40 Pa. St. 199.

² *United States v. Cumpston*, 3 McLean, 103; and see *McGowan v. Caldwell*, 1 Cranch C. C. 481.

³ *McCue v. Corporation of Washington*, 3 Cranch C. C. 639.

⁴ *Barlow v. Todd*, 3 Johns. 367; *Allen v. Watson*, 16 Id. 205.

⁵ *Munro v. Alaire*, 2 Cai. 320.

⁶ *Andrus v. Waring*, 20 Johns. 153.

⁷ *Rogers v. Burk*, 10 Johns. 400.

⁸ *Bame v. Drew*, 4 Denio, 287.

⁹ *Richardson v. Hall*, 21 Md. 399.

assigning several grounds, the substance of which was that the reply was a departure from the complaint: it was held that the demurrer was well taken. The reply was a total departure from the complaint. The right to recover individually and the right to recover as receiver are entirely distinct rights, and depend upon entirely different facts. The plaintiff, on receiving the answer, should have amended his complaint, or if it was not amendable, he should have discontinued.¹

§ 4598. **Departure.**—A departure is matter of substance, and bad on general demurrer.² A rejoinder of infancy was held a departure from a plea of an insolvent discharge.³ After a plea of no award, a rejoinder confessing and avoiding the award is a departure.⁴ A rejoinder impeaching the award as incomplete is a departure.⁵ But a rejoinder that the defendant, prior to the making of the award, had, by writing under his hand and seal, revoked the submission, is good. A void award is no award.⁶ A rejoinder affirming the defense of the plea by denying the substance of the replication, without reaffirming an immaterial averment of value in the plea, is not a departure.⁷

§ 4599. **Duplicity.**—A replication which alleges two distinct and independent facts, either of which is a complete answer to the plea, is double, and is bad on special demurrer.⁸

§ 4600. **Goods Sold.**—To a complaint charging acceptance of goods purchased to have been procured by the fraudulent representations of the seller, without examination by the buyer, the defendant answered denying the fraud, and alleging that the buyer had examined the goods and had full knowledge of their quality. The reply admitted an examination of the goods by the plaintiff, and a knowledge of certain facts indicating the defects complained of, but averred that he relied on defendant's representations, and that the defendant had subsequently promised to pay the damages claimed: it was held that the reply was a departure, and that objection could be taken to it by demurrer.⁹

§ 4601. **Insurance Policy.**—To a declaration on a policy of insurance averring a total physical loss, a replication of survey and condemnation after arrival at the port of destination is a departure.¹⁰

¹ *White v. Miles*, 11 How. Pr. 36.

² *Sterns v. Patterson*, 14 Johns. 132.

³ *Roberts v. Kelly*, 2 Hall, 307.

⁴ *Munro v. Alaire*, 2 Cai. 320.

⁵ *Barlow v. Todd*, 3 Johns. 367.

⁶ *Blacksell v. Tomkins*, 11 East, 187; *Allen v. Watson*, 16 Johns. 205.

⁷ *Burr v. Baldwin*, 2 Wend. 580.

⁸ *Burnham v. Webster, Davies*, 236; and see *Craig v. Brown*, Pet. C. C. 443.

⁹ *McAroy v. Wright*, 25 Ind. 22.

¹⁰ *Griswold v. National Ins. Co.*, 3 Cow. 96.

§ 4602. **Obstructing Highway.**—An indictment for obstructing a highway alleged in the first count the obstruction of a road “leading from S.’s gate to B.’s house,” and in the second count the obstruction of a road leading “from S.’s gate toward the turnpike.” A replication averring that the road ran “from S.’s gate to the turnpike” was held a departure, as the former averred the existence of a public road, while the latter did not.¹

§ 4603. **Withdrawal of Plea.**—Where a plaintiff replies to a plea, and his replication being demurred to is held to be insufficient, and he withdraws that replication and substitutes a new one—the substituted one being complete in itself, not referring to or making part of the one which preceded—he waives the right to question in the supreme court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one.²

CHAPTER IX.

JUDGMENT ON PLEADINGS.

§ 4604. **In General.**—If a complaint be itself sufficient, the plaintiff may apply for judgment on the pleadings, if the defendant has filed an answer which expressly admits the material facts stated in the complaint; or when the answer leaves all the material allegations of the complaint undenied. This practice is constantly pursued when denials in verified answers are literal, conjunctive, evasive, or the like; and is equally applicable where an answer which merely sets up new matter is found substantially insufficient.³

§ 4605. **Notice of Motion for Judgment on the Pleadings.**

Form No. 1129.

[TITLE.]

Please take notice that the plaintiff will, on the day of 18..., at the court-house in the city of, and at the hour of o’clock of said day, or as soon thereafter as counsel can be heard, move the court for judgment on the pleadings in said action, on the ground that the answer filed

¹ State v. Price, 21 Md. 449.

² Clearwater v. Meredith, 1 Wall. 25.

³ Felch v. Beaudry, 40 Cal. 439;

Corwin v. Patch, 4 Id. 204; Gay v. Winter, 34 Id. 153; Fitzgibbon v. Calvert, 39 Id. 261; see also N. Y.

Code, sec. 537.

therein is frivolous [or state other grounds]. This motion will be based upon the pleadings on file in said action.

§ 4606. **Defective Pleading.**—When an answer is put in defective in form only, plaintiff should demur, and not move for judgment on the pleadings.¹ Nor can defendant have judgment on the pleadings on the ground that several causes of action have been improperly joined in the complaint, or a cause of action alleged which is against public policy.² If, instead of demurring, advantage be taken of a defective pleading by motion for judgment, the court should permit an amendment of the pleading, where an amendment will cover the defect, the same as if a demurrer had been interposed.³

§ 4607. **Denial.**—It does not follow because defendant makes no denial of any allegation in the complaint that this is such an admission of the cause of action that a judgment contrary to the admission is erroneous, if affirmative matter of defense is stated.⁴ If the answer contains a denial of the material facts alleged as a cause of action in the complaint, and a special defense stated separately, the plaintiff is not entitled to a judgment on the pleadings, even if the entire cause of action is confessed in the special defense.⁵ In a suit against a former administrator by his successor, who alleges a final settlement of the former's accounts, and a final decree as to his administration, a denial of these allegations is sufficient to prevent a judgment on the pleadings.⁶ In a suit on a promissory note, a denial that anything remains due, coupled with an allegation of payment to original holder, without notice of an alleged assignment, raises an issue of fact, and judgment for plaintiff should not be given on the pleadings.⁷ If plaintiff treats the denials as sufficient, and goes to trial and introduces evidence in support of his complaint, he can not afterwards move for judgment on the pleadings.⁸

§ 4608. **Demurrer must be Disposed of.**—When a demurrer is filed to defendant's answer, it is irregular for plaintiff to take judgment before some disposition is made of the de-

¹ Gallagher v. Dunlap, 2 Nev. 326; Childs v. Griswold, 15 Iowa, 438.

² Watson v. S. F. & H. B. R. R. Co., 50 Cal. 523.

³ Cal. State Tel. Co. v. Patterson, 1 Nev. 151.

⁴ Newell v. Doty, 33 N. Y. 83.

⁵ Nudd v. Thompson, 34 Cal. 39; Amador Co. v. Butterfield, 51 Cal. 526.

⁶ Craig v. Bateman, 49 Cal. 71.

⁷ Farmers' and Mechanics' Bank v. Christensen, 51 Cal. 571.

⁸ Tevis v. Hicks, 41 Cal. 123. As to what admissions are conclusive against the defendant, see Burke v. Laforge, 12 Id. 403; Fremont v. Seals, 18 Id. 433; Mathews v. Fitch, 22 Id. 86, 229; Blood v. Light, 31 Id. 115; Nunan v. San Francisco, 38 Id. 689; consult also "Admissions in the Answer," vol. 2, sec. 3177.

murrer,¹ as the demurrer must be disposed of before the issue of fact is tried,² and before judgment on the merits can be rendered.³ But if no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial.⁴

§ 4609. **Discretion.**—Motions for judgment on the pleadings are allowed in the discretion of the court.⁵ Such motions can be allowed only where the answer wholly fails to deny any material allegation of the complaint.⁶ Vagueness is not visited by judgment.⁷

§ 4610. **Frivolous Answer.**—It seems that the plaintiff can not move for a judgment, as on a frivolous plea, unless the answer as an entirety is frivolous. If it contains several defenses, some well pleaded and some insufficient, the latter should be demurred to, or moved to be stricken out, as the case may be.⁸ But if parts only are bad, relief is to be had by a motion to strike out. It is true that there may be no objection to combining both of these applications in one motion, but in that case, whether judgment on the whole answer can be granted must depend on whether the parts of the pleading objected to are stricken out, and if they are, whether the whole answer, as it then remains, be frivolous.⁹ In an action to quiet title, an answer which denies that plaintiff is the owner or in possession of the property, except as tenant in common with defendant, and alleges that the deed set out in the plaintiff's complaint, and under which he claims, was not intended as a conveyance, but simply to enable him to sell the property, and that the grantor therein had subsequently conveyed an interest in the property to defendant, presents a defense, and plaintiff is not entitled to judgment on the pleadings.¹⁰ When an answer sets up four defenses, two of which tendered issues with the complaint, and two of which in hypothetically admitting the averments of the complaint averred matter in avoidance, upon motion, it was held: 1. That the two hypothetical defenses must be stricken out; 2. That as there was enough left in the answer to put the plaintiff to proof of his case, it was unnecessary to allow an amendment.¹¹ Vagueness in pleading is not frivolousness;

¹ Huse v. Moore, 20 Cal. 115; Calderwood v. Tevis, 23 Id. 335.

² Ellis v. Loumier, 1 Mo. 260.

³ Manifee v. D'Lashmutt, 1 Mo. 258.

⁴ Calderwood v. Tevis, 23 Cal. 335.

⁵ Willson v. McDonald, Cal. Sup. Ct., July T., 1869.

⁶ Id.

⁷ Kelly v. Barnett, 16 How. Pr. 135.

⁸ Van Valen v. Lapham, 13 How. Pr. 240.

⁹ Lockwood v. Salhenger, 18 Abb. Pr. 136.

¹⁰ Garvey v. Willis, 50 Cal. 619.

¹¹ Hamilton v. Hough, 13 How. Pr. 14.

it is to be corrected by amendment.¹ As to what answers are deemed frivolous, consult section 3176 et seq.

§ 4611. **Election.**—When the defendants serve a pleading containing matter in answer and matter in demurrer to the complaint, they should be compelled to elect between the two.² So where a demurrer to a plea is overruled, and the plaintiff does not obtain leave to withdraw it and file a replication, it amounts to an election to stand on the demurrer, and judgment should be rendered for the defendant.³

§ 4612. **Verified Answer.**—A verified answer which in any part contains a distinct denial of a fact material to plaintiff's recovery can not, whatever its defects, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings.⁴

¹Kelley v. Barnett, 16 How. Pr. 135.

²Marshall v. Platte Co., 12 Mo. 88.

³Slocum v. Wheeler, 4 How. Pr. 373; Struver v. The Ocean Ins. Co., 16 How. Pr. 422.

⁴Ghirardelli v. McDermott, 22 Cal. 539.

PART NINTH.

TRIAL, AND ITS INCIDENTS.

CHAPTER I.

ISSUES.

§ 4613. **In General.**—When the pleadings in an action (the complaint and answer) are made up, the question first to be arrived at before going into trial is, What are the issues to be tried? This proposition must be carefully examined and clearly understood before the parties can prepare for trial, for if the true issue or issues are not understood by counsel for the plaintiff or defendant, the one can not prepare intelligibly for the prosecution of his claim, nor the other for his defense. Certain steps are necessary to be taken on the part of the plaintiff to establish his claims against the defendant. The bare fact that the plaintiff has suffered an injury does not always entitle him to the relief asked for in his complaint; hence it becomes a question of chief importance to so frame the issue in the pleadings that he may obtain the relief to which the nature of the injury entitles him. He, being the moving party, must be prepared to so present his case that he can show: 1. That the defendant did the injury; 2. He must show the same character of injury which the complaint mentions; 3. The amount of the damage done, and that it is the same described in the complaint; 4. He must show that the issue made by the pleadings is sustained by the proofs—that is, he can not prove a cause of action not pleaded; and hence the familiar rule that the *allegata* and *probata* must agree. By issues is meant the fact of difference between plaintiff and defendant. In one action there may be a number of issues, each of which is vital and necessary to be tried to make out plaintiff's cause. They are integral parts of one whole, and if plaintiff fails to plead or prove each of these

necessary parts, his action falls. Each is a link in the chain of circumstances, which makes up in detail the whole case. It is therefore the better practice for an attorney to make a note of each step to be taken in the course of the trial, before going into court, and to do that he must take for his guide the issue in the cause. This is necessary because the parties to the action, if informed of the facts necessary to be proved to make out their case, need only to bring into court such evidence as will effect the purpose, and not, as is often done, be firing at random, apparently without object, and certainly without success. In most causes, the real points will thus be greatly narrowed down, and it will require but a few witnesses or a comparatively small amount of evidence to sustain the action, if there be merit in it, and hence counsel should know before going into court, as far as possible, what he wants to prove; and second, if the whole issue is made up of parts, analyze them, and then make the proofs in the order in which they ought to be presented to the court or jury. In many cases it is of vast importance to present the proofs in logical order, which means the natural order, and this should be a point of no small interest to the practitioner, for if logically presented, unprofessional minds like jurors will grasp the ideas with more readiness, and the judge or professional listener will comprehend the relevancy of the testimony without comment or explanation.

§ 4614. **Joinder of Issue.**—The authorities generally define an issue to be a single, certain, and material point, issuing out of the allegations or pleas, consisting regularly of an affirmative and negative;¹ while an immaterial issue is one taken on an immaterial point, and not necessary to decide the action.² An issue is joined where there is a direct affirmation and denial of the fact in dispute; and it makes no difference whether the affirmative or the negative is first averred.³ Where nothing is in fact controverted, no issue is joined.⁴ The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and that the jury may not be misled by the introduction of various matters.⁵ The pleadings having been made up, the cause is at issue. An issue arises when a fact or conclusion

¹ 2 Burr. Dict. 99; Co. Lit. 126 a; see 3 Bla. Com. 313; French Law, 336; Story's Eq. Pl., sec. 1; Steph. on Pl. 124; 1 Van Santv. Pl. 733; 1 Ch. Pl. 652.

² Steph. Pl. 129; 1 Ch. Pl. 692; 2 Tidd's Pr. 921; Gould Pl., c. 6, sec. 27.

³ Van Gieson v. Van Gieson, 12 Barb. 520.

⁴ Pardee v. Schenck, 11 How. Pr. 500.

⁵ Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46.

of law is maintained by the one party and is controverted by the other. Issues are of two kinds: 1. Of law; and 2. Of fact.¹

§ 4615. **Issues of Law.**—An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof;² and is tried by the court, unless referred by consent.³ A court can not properly, even by consent of parties, pass upon questions not raised by the written allegations of the pleadings.⁴ Where an issue of law goes to only a portion of a pleading, the case may be put on the calendar for trial of the issue of fact, joined by other portions, without waiting for the decision of the former.⁵ Various illustrations of issues of law are cited in the notes.⁶

¹ Cal. Code C. P., sec. 588; N. Y. Code, sec. 963.

² Cal. Code C. P., sec. 589; N. Y. Code, sec. 964; Laws of Oregon, sec. 172; 3 Bla. Com. 314; 3 Steph. Com. 572.

³ Cal. Code C. P., sec. 591; N. Y. Code, sec. 969.

⁴ *Boggs v. Merced M. Co.*, 14 Cal. 279.

⁵ *Palmer v. Smedley*, 13 Abb. Pr. 185.

⁶ *Account.*—What constitutes an account stated is a question raising an issue of law: *Lockwood v. Thorne*, 11 N. Y. 170.

Adverse Possession.—The facts to establish adverse possession are to be found by the jury, but what constitutes adverse possession is a question of law: *Macklot v. Dubreuil*, 9 Mo. 473; *Bowie v. Brahe*, 3 Duer, 35; *Jackson v. Walker*, 7 Cow. 637; *Munro v. Merchant*, 26 Barb. 383.

Agreement.—Whether letters which have passed between parties constitute an agreement: *Luckhart v. Ogden*, 30 Cal. 547. Whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and if so, what time, are questions of law for a court, and not of fact for a jury: *Id.*

Assignment.—The legal effect of an assignment: *Goodrich v. Downs*, 6 Hill, 438; *Sheldon v. Dodge*, 4 Denio, 217; *Cunningham v. Freeborn*, 11 Wend. 240; of a chattel mortgage: *Spies v. Boyd*, 1 E. D. Smith, 445; *Edgell v. Hart*, 9 N. Y. 213—are questions of law.

Carelessness.—What facts and circumstances constitute evidence of carelessness: *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 251.

Compliance.—Whether one claiming a discharge in insolvency has strictly complied with the provisions of the insolvent act is a question of law: *Schloss v. His Creditors*, 31 Cal. 201.

Contract.—Whether a contract has been rescinded or not, as whether the undisputed acts of parties amount to a rescission: *Healy v. Utley*, 1 Cow. 345; or its construction: *Thomas v. Dickinson*, 23 Barb. 431; and the validity and effect of a contract—are questions raising an issue of law: *Chapin v. Potter*, 1 Hilt. 366. But when the meaning is to be judged by facts *aliunde*, it is a question for the jury: *Gardner v. Clark*, 17 Barb. 538.

Due Diligence.—Due diligence is sufficiently defined to enable courts to determine whether any given state of facts is sufficient to constitute it or not: *Ophir Co. v. Carpenter*, 4 Nev. 534; see *Carroll v. Upton*, 3 N. Y. 272.

Evidence.—Admissibility of evidence is a question for the court: *People v. Glenn*, 10 Cal. 32; *Gould v. Weed*, 12 Wend. 12; compare *Larue v. Rowland*, 7 Barb. 107; see also *Harris v. Wilson*, 7 Wend. 57. Or of a witness objected to for interest: *Tabor v. Staniels*, 2 Cal. 240. Or whether a witness is competent: *Reynolds v. Lounsbury*, 6 Hill, 534; *Scherpf v. Szadeczky*, 1 Abb. Pr. 366; *Prall v. Hinchman*, 6 Duer, 351. Or whether a paper is proper to be read: *Tillou v. Clinton and Essex Mut. Ins. Co.*, 7 Barb. 564. Whether evidence offered tends in any respect to make out fraud: *Gage v. Parker*, 25 Id. 141; *Erwin v. Voorhees*, 26 Id. 127. In slander, if there is no dis-

§ 4616. **Issues of Fact.**—An issue of fact is an issue taken upon or consisting of matters of fact, the fact only, and not the

pute as to the facts, the question whether the testimony given by plaintiff was material to the point in issue: *Power v. Price*, 16 Wend. 450.

Fraud.—When there is no dispute upon the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury: *Chenery v. Palmer*, 6 Cal. 119; *Sturtevant v. Ballard*, 9 Johns. 337; *Jennings v. Carter*, 2 Wend. 446; *Gage v. Parker*, 25 Barb. 141; *Erwin v. Voorhees*, 26 Id. 127; *Edgell v. Hart*, 9 N. Y. 213.

Grant.—The construction of the terms of a grant: *Frier v. Jackson*, 8 Johns. 495; as to the validity and effect of a Mexican grant: *Seaward v. Malotte*, 15 Cal. 304; as to its loss and contents: *Id.*; as to the effect of mesne conveyance through which plaintiff claimed under the grant: *Id.*; if there is no dispute about the facts, the question what premises are embraced by the terms of the instrument are questions for the court: *St. John v. Bumpstead*, 17 Barb. 100.

Insurance.—Whether preliminary proofs of loss of vessel are sufficient to satisfy requirements of policy, and whether facts shown amount to a waiver of defects in the proofs, are questions for the court: *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 268.

Judgment.—Whether a judgment was properly entered, *Lecse v. Clark*, 28 Cal. 26, is a question of law; but the issue *nul tiel record* is for the jury: *Fasnacht v. Stehn*, 53 Barb. 650; 5 Abb. Pr., N. S., 338.

Jurisdiction.—Whether the proceedings of the probate court showed jurisdiction to make certain orders is a question of law: *Seaward v. Malotte*, 15 Cal. 304.

Libel.—Whether the article is libelous on its face is a question for the court: *Matthews v. Beach*, 5 Sandf. 256. But whether the language is capable of bearing the meaning assigned by the court, or whether the meaning is truly assigned to the language, is for the jury: *Blagg v. Start*, 10 Q. B. 899; *Broome v. Goslen*, 1 C. B. 728; *Barrett v. Long*, 3 H. L. Cas. 395.

Mining Laws.—The construction of mining laws, when introduced in evidence, is a question for the court:

Fairbanks v. Woodhouse, 6 Cal. 433.

Negligence.—Where facts are ascertained, whether they amount to negligence: *Dascomb v. Buffalo and State Line R. R. Co.*, 27 Barb. 221; *Stevens v. Oswego and Syracuse R. R. Co.*, 18 N. Y. 422; *Mackey v. N. Y. Cent. R. R. Co.*, 27 Barb. 528; *Brooks v. Buffalo and Niagara R. R. Co.*, *Id.* 532, note; *Brendell v. Buffalo State Line R. R. Co.*, *Id.* 534, note.

New Promise.—Where the facts are undisputed, it is for the court to determine whether a sufficient promise has been made to take the case out of the statute: *Clarke v. Dutcher*, 9 Cow. 674.

Notice.—The sufficiency of the notice of the dishonor of a note, where there is no dispute about the facts, is a question of law: *Cayuga Co. Bank v. Warden*, 6 N. Y. 29; *Farmers' Bank v. Vail*, 21 Id. 487. So, the question whether the notice was given within a reasonable time: *Bryden v. Bryden*, 11 Johns. 187; *Tindal v. Brown*, 1 T. R. 167; *Scheibel v. Fairbain*, 1 Bos. & Pul. 388. Or whether the holder used due diligence to find the drawer or indorser: *Bank of Utica v. Bender*, 21 Wend. 643; *Spencer v. Bank of Salina*, 3 Hill, 520. So whether a written notice of protest is sufficient in terms to charge an indorser: *Remer v. Downer*, 23 Wend. 620; *Ransom v. Mack*, 2 Hill, 587; *Dole v. Gold*, 5 Barb. 490; *Cook v. Litchfield*, 9 N. Y. 279.

Parties.—The question as to proper parties plaintiff is a question of law: *Seaward v. Malotte*, 15 Cal. 304.

Partnership.—If facts are undisputed, the question of partnership is for the court: *Cumpston v. McNair*, 1 Wend. 457.

Probable Cause, Reasonable Cause, are questions of law: 1 T. R. 542; 1 Gale & D. 504; *Bulkeley v. Ketaltas*, 6 N. Y. 384; *Carpenter v. Sheldon*, 5 Sandf. 77; *Gordon v. Upham*, 4 E. D. Smith, 9; *Waldheim v. Sichel*, 1 Hilt. 45; *Bulkeley v. Smith*, 2 Duer, 261; *Besson v. Southard*, 10 N. Y. 236; *McCormick v. Sisson*, 7 Cow. 715; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 Id. 424; *Hall v. Suydam*, 6 Barb. 83; *Stevens v. Lacour*, 10 Id. 62. Probable cause is a mixed question of law and fact: See

law, being disputed.¹ Such issues arise: 1. Upon a material allegation in the complaint, controverted by the answer; 2. Upon new matters in the answer, except an issue of law is joined thereon.² In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference be ordered. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee.³ They are made by the pleadings, and should be submitted to the jury as thus made.⁴ The right of trial by jury is a right of which no litigant in a proper case can be deprived without his consent. And if the court refuses a demand for a jury trial of issues of fact in an action at law, it is an error for which the appellate court ought to grant a new trial, notwithstanding the issues have been fairly tried by the court, and proper judgment rendered.⁵ Various illustrations of questions which raise an issue of fact are cited in the note.⁶

Potter v. Seale, 8 Cal. 217; *Grant v. Moore*, 29 Id. 644; *Brandt v. Higgins*, 10 Mo. 728.

Receipt.—The facts being undisputed, and no fraud shown, the question of the effect of a receipt, as establishing an accord and satisfaction, is a question of law: *Vedder v. Vedder*, 1 Denio, 257.

Waste.—Whether the question what amounts to a waste is a question of law or fact: *Jackson v. Brownson*, 7 Johns. 227; *Cooper v. Stower*, 9 Id. 331; *Jackson v. Tibbitts*, 3 Wend. 341; *Kidd v. Dennison*, 6 Barb. 9; *McGregor v. Brown*, 10 N. Y. 114.

Written Instrument.—That a written instrument is or is not a mortgage: *Fairbanks v. Bloomfield*, 2 Duer, 353; the legal effect of written documents: *Carpentier v. Thirston*, 24 Cal. 268—are questions of law.

¹ 3 Bla. Com. 314; Co. Lit. 126 a; 3 Steph. Com. 572.

² Cal. Code C. P., sec. 590; see also N. Y. Code, sec. 964; Laws of Oregon, sec. 173.

³ Cal. Code C. P., sec. 592.

⁴ *Bankston v. Farris*, 26 Mo. 175; *Overton v. Webster*, Id. 332.

⁵ *Treadway v. Wilder*, 12 Nev. 108.

⁶ *Abandonment*.—When, in ejection on prior possession, abandonment is pleaded, and evidence on it

is introduced, the question of adverse possession is for the jury: *Roberts v. Unger*, 30 Cal. 676; *Jackson v. Joy*, 9 Johns. 102. So of mining claims: *Warring v. Crow*, 11 Cal. 371. So whether an abandonment of insured vessel is accepted or not: *Bell v. Smith*, 2 Johns. 98.

Appurtenances.—What are appurtenances of a steamboat is a question of fact for the jury: *Amis v. Steamboat "Louisa"*, 9 Mo. 621.

Assent.—Whether a party has assented to acts of the sheriff: *Moore v. Westervelt*, 2 Duer, 59. So knowledge or assent, generally, is a question of fact: *Weaver v. Page*, 6 Cal. 681; *Bensley v. Atwill*, 12 Id. 231.

Baggage.—Whether articles of a doubtful character are to be deemed as baggage is a question of fact: *Grant v. Newton*, 1 E. D. Smith, 95.

Bill of Exchange.—That a bill was presented for payment, and payment demanded, is a question of fact: *Graham v. Machado*, 6 Duer, 514.

Compensation.—In a suit for services rendered, whether such services were intended to be gratuitous is a question for the jury: *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. 13.

Compulsion.—The question of compulsion in the ejection of a passenger from a railroad car is one for the jury:

§ 4617. Mixed Issues of Law and Fact.—Where there

Kline v. C. P. R. R. Co., 37 Cal. 400; *S. C.*, 39 Id. 587.

Conversion.—The time of the conversion: *Hyde v. Stone*, 9 Cow. 230; and the amount of damages in action for the detention of personal property: *Bartlett v. Hogden*, 3 Cal. 55—are questions for the jury.

Custom.—Whether such a custom existed or not is a question of fact: *Panaud v. Jones*, 1 Cal. 500.

Death of Parties.—Where the death of one of the defendants is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury: *Fowler v. Houston*, 1 Nev. 469.

Dedication.—What amounts to a dedication of homestead is a question of fact: *Cook v. McChristian*, 4 Cal. 23. So of the dedication of land for a street: *Harding v. Jasper*, 14 Id. 648; see *Aleman v. Petaluma*, 38 Id. 553.

Delivery of Goods.—Whether absolute or conditional, is a question of fact: *Houghtaling v. Ball*, 19 Mo. 84; *Fleeman v. McKean*, 25 Barb. 474; *Downer v. Thompson*, 6 Hill, 208.

Description of Land.—Whether the land, as described in the deed given in evidence, is the same as that described in the plaintiff's declaration, is a question for the jury: *Lawless v. Newman*, 5 Mo. 236; *Newman v. Lawless*, 6 Id. 279. So where parol evidence is resorted to to identify the calls of a survey, the facts must be found by the jury: *Ott v. Soulard*, 9 Id. 573.

Diligence and Care is a question of fact for the jury: *Richmond v. Sac. Val. R. R. Co.*, 18 Cal. 351. Ordinary care: *Aymar v. Astor*, 6 Cow. 267.

Election or Intention is a question of fact for the jury: *Clift v. White*, 12 N. Y. 538; *Moss v. Riddle*, 5 Cranch, 351; *Griffin v. Cranston*, 1 Bosw. 281; *Miller v. The People*, 5 Barb. 203; 20 Barb. 549; *Gilman v. Reddington*, 24 N. Y. 12.

Evidence.—The weight of evidence is a question for the jury: *Battersby v. Abbott*, 9 Cal. 565; *Winston v. Wales*, 13 Mo. 569; *Patterson v. McClanahan*, Id. 507; *Van Ness v. Packard*, 2 Pet. 138; *People v. Dick*, 32 Cal. 213; *S. C.*, 34 Id. 663; *Tuttle v. Buck*, 41 Barb. 417. Whether evidence is sufficient to prove execution of a bond: *Hicks v. Chouteau*, 12 Mo.

341. It is for the jury, and not the court, to construe the meaning of an ambiguous reply to a question in a deposition: *Marine Ins. Co. of Alex. v. Young*, 5 Cranch, 187.

Fixtures.—Whether personal property has been annexed to the freehold, or whether it was so annexed for the purposes of trade only, is a question of fact: *Hovey v. Smith*, 1 Barb. 372.

Foreign Law.—What is the law of a foreign country is a question of fact: *Western v. Genesee Mutual Insurance Co.*, 12 N. Y. 258.

Fraud.—Actual fraud is always (Cal. Civil Code, sec. 1574) a question of fact: *Seaman v. Mariani*, 1 Cal. 336; *Billings v. Billings*, 2 Id. 107; *Ford v. Chambers*, 19 Id. 143; *Wellington v. Sedgwick*, 12 Id. 469. Whether omission to change possession under sale or mortgage of chattels was with fraudulent intent: *Prentiss v. Slack*, 1 Hill, 467; *Butler v. Van Wyck*, Id. 438; *Smith v. Acker*, 23 Wend. 653; *Stewart v. Slater*, 6 Duer, 83; *Gardner v. McEwen*, 19 N. Y. 123; *Groat v. Rees*, 20 Barb. 26; compare *Edgell v. Hart*, 9 N. Y. 213. The question whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness and to secure future advance to be made, is one of fact for the jury, under proper instructions from the court: *Tully v. Harloe*, 35 Cal. 302. It is only on proof of a good consideration that the cause goes to the jury on the question of fraud in fact: *Allen v. Cowan*, 28 Barb. 99. In an action to obtain chattels purchased at a sale on execution, the questions whether there was an intent to defraud creditors, whether the property was in view of the bidders, whether it was offered in judicious lots, are questions of fact: *Bruce v. Westervelt*, 2 E. D. Smith, 440. Whether the transfer of the interest of a partner to his copartner was made with intent to defraud creditors: *Griffin v. Cranston*, 1 Bosw. 281. Fraud in the procurement of an entry of land in a contest between two claimants from the United States: *Waller v. Von Phul*, 14 Mo. 84—are questions of fact.

Grant.—The question what premises are embraced in a grant depending on evidence outside the grant, identity of landmarks referred to is

are issues both of law and fact to the same complaint, it is

for the jury: *Frier v. Jackson*, 8 Johns. 496.

Instigation and Request are questions of fact: *Ives v. Humphreys*, 1 E. D. Smith, 200.

Insurance.—Whether circumstances not communicated to the insurer, on application for a policy, were material to the risk, and necessary to be communicated: *Firemen's Ins. Co. v. Walden*, 12 Johns. 513; *Livingston v. Delafield*, 1 Id. 522; *Burritt v. Saratoga Co. Mut. Ins. Co.*, 5 Hill, 188; *Gates v. Madison Co. Mut. Ins. Co.*, 2 N. Y. 43; the length of time usual for a vessel to perform a voyage: *MacKay v. Rhineland*, 1 Johns. Cas. 408; whether vessel was lost within the time fixed in the policy: *Brown v. Neilson*, 1 Cai. 525; whether the preliminary proofs were furnished of the loss, or whether the acts were done which are relied on as constituting a waiver of defects in the proofs: *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 268; whether erecting additional buildings increases the risk: *Grant v. Howard Ins. Co.*, 5 Hill, 10; whether keeping a small quantity of tow in a building amounts to using it for storing flax: *Hynds v. Schenectady Co. Mut. Ins. Co.*, 16 Barb. 119; affirmed in 11 N. Y. 564—are questions for the jury.

Libel.—The truth of a libel is a question for the jury: *King v. Root*, 4 Wend. 113. Whether or not libelous article is applicable to the plaintiff: *Green v. Telfair*, 20 Barb. 11. The true interpretation of an ambiguous libel is a question for the jury; but if, upon an examination of the whole writing and comparison of its different parts, it appears to admit of no just construction except one injurious to the plaintiff, its meaning is to be determined by the court: 9 Barn. & Cress. 643; 10 Id. 472; 5 Johns. 211; *Lewis v. Chapman*, 16 N. Y. 369; see *ante*, p. 268.

Malice is a question of fact for the jury: *Potter v. Seale*, 8 Cal. 217; *Bulkeley v. Smith*, 2 Duer, 261.

Necessaries.—Necessaries or not necessities may be a mixed question of law and fact: *Wharton v. McKenzie*, 5 Q. B. 606. But what constitutes necessary furniture is a question of fact for the jury: *Wilson v. Ellis*, 1 Denio, 462.

Negligence.—Where facts are dis-

puted, the question of negligence is for the jury: *Richmond v. Sac. Val. R. R. Co.*, 18 Cal. 351; *Bernhardt v. Rensselaer R. R. Co.*, 23 How. Pr. 166; *Buckingham v. Payne*, 36 Barb. 81; *Mangan v. Brooklyn R. R. Co.*, Id. 237; *Foot v. Wiswall*, 14 Johns. 304; *Moore v. Westervelt*, 21 N. Y. 103.

Nuisance.—Whether obstructions amount to a nuisance: *Gunter v. Geary*, 1 Cal. 467; *Blanc v. Klumpke*, 29 Id. 156; *City of San Francisco v. Clark*, 1 Id. 386; but see *Fire Department v. Harrison*, 9 Abb. Pr. 1; S. C., 18 How. Pr. 181; *Brown v. Mohawk and Hudson R. R. Co.*, How. App. Cas. 52, 66. In an action for obstructing access to plaintiff's lot, the question whether the obstruction was carried to an unnecessary or unreasonable degree, or was continued for an unreasonable length of time, are questions of fact: *St. John v. Mayor of N. Y.* 6 Duer, 315. But the question of a flagrant nuisance is a mixed question of law and fact: *Hentz v. Long Island R. R. Co.*, 13 Barb. 647, 657.

Notice.—Whether notice has been served or not: *Jackson v. Livingston*, 3 Johns. 455; whether a notice referred to the same note, and was so understood by the indorser: *Reedy v. Seixas*, 2 Johns. Cas. 337; *Ontario Bank v. Petrie*, 3 Wend. 456; *Bank of Rochester v. Gould*, 9 Id. 279; whether indorser was misled: *McKnight v. Lewis*, 5 Barb. 681; see *Clark v. Dearborn*, 6 Duer, 309—are questions of fact.

Partnership.—Whether a partnership existed, what must be the firm name, and whether note was given for partnership transactions, are questions for the jury: *Drake v. Elwyn*, 1 Cai. 184. So of notice of dissolution of partnership: *Rabe v. Wells*, 3 Cal. 151; *Treadwell v. Wells*, 4 Id. 260.

Payment.—Whether acceptance of a part payment is intended by the creditor to be in full or not: *Pierce v. Pierce*, 25 Barb. 243; where there is a conflict of evidence, the question whether a note was received in payment: *Atlantic Fire and Marine Ins. Co. v. Boies*, 6 Duer, 583; *Johnson v. Weed*, 9 Johns. 310; whether money forwarded to acceptor by indorsee through drawer was intended as a payment so as to discharge acceptor:

required that the issues of law be first disposed of by the

Bean v. Canning, 2 E. D. Smith, 419; whether a promissory note was received as payment: *Myatts v. Bell*, 41 Ala. 222—are questions for the jury.

Pre-emption.—Whether acts have been performed giving a person the rights of pre-emption is a question of fact: *Megerle v. Ashe*, 33 Cal. 74. See also *Toland v. Mandell*, 38 Id. 30.

Principal and Agent.—Whether the credit was given to the agent or his principal is a question of fact for the jury: *Hovey v. Pitcher*, 13 Mo. 191. Whether an agent acted within the scope of his authority is a question of fact: *Taylor v. Labeaume*, 14 Id. 572; *McMorris v. Simpson*, 21 Wend. 610. Where goods were sent by a commission merchant to agents, it is for the jury to decide whether such agents were the agents of the commission merchant or the owner of the goods: *Pomeroy v. Sigerson*, 22 Mo. 177. The authority of an agent, *Thurman v. Wells*, 18 Barb. 500, is a question for the jury.

Prior Appropriation.—Priority in the appropriation of water is a question of fact for the jury: *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

Prior Possession.—The question as to whether a settler on the public land has proceeded with reasonable diligence to follow up his location with the necessary improvements, so as to recover against a subsequent possessor, is a question of fact for the jury: *Staininger v. Andrews*, 4 Nev. 59; *Sharon v. Davidson*, Id. 416.

Private Way.—Whether the change in a private way was by agreement or not, and whether it was to be permanent, are questions of fact: *Hamilton v. White*, 4 Barb. 60; affirmed, 5 N. Y. 9.

Prohibited Sale.—Whether a sale was made in good faith, or was an invasion of a prohibiting statute, is a question of fact: *Baker v. Richardson*, 1 Cow. 77; *Suydan v. Morris Canal and Banking Co.*, 6 Hill, 217.

Reasonable Search.—Whether or not reasonable search has been made for lost document is a question of fact: *Clark v. Owens*, 18 N. Y. 435.

Reasonable Use.—Reasonableness of the use of water is a question for the jury: *Hetrich v. Deachler*, 6 Pa. St. 32; *Esmond v. Chew*, 15 Cal. 143; *Thomas v. Brackney*, 17 Barb. 654.

Reputed Ownership is a question of fact for the jury: *Edwards v. Scott*, 1 Man. & G. 962; S. C., 2 Scott's N. R. 266.

Sale.—Whether a sale was completed or not is a question for the jury: *De Ridder v. M'Knight*, 13 Johns. 294. Also, whether a party assented to a sale under execution where property was sold of which he was joint owner: *Fiero v. Betts*, 2 Barb. 633.

Seaworthy or Not is a question of fact for the jury: *Sherwood v. Ruggles*, 2 Sandf. 55; *Patrick v. Hallett*, 1 Johns. 241; *Clifford v. Hunter*, 3 Car. & P. 16; *Walsh v. Wash. Mar. Ins. Co.*, 32 N. Y. 427.

Special Agreement.—Whether there was a special agreement by which the original demand sued on was extinguished by note or receipt in full is a question of fact: *Steamboat Charlotte v. Hammond*, 9 Mo. 58.

Trespass.—Where possession is proved, it is for the jury to determine whether acts of the defendant of which evidence is given amount to a trespass: *Perry v. Block*, 1 Mo. 484. The amount of damages in actions of trespass is a question of fact for the jury: *Drake v. Palmer*, 4 Cal. 11.

Warranty.—The question whether words used by a seller of chattels amount to a warranty: *Duffee v. Mason*, 8 Cow. 25; *Rogers v. Ackerman*, 22 Barb. 134; whether defect in the property sold was greater than that excepted in the vendor's warranty: *Wade v. Scott*, 7 Mo. 509; sound or unsound: *Lewis v. Peake*, 7 Taunt. 153—are questions of fact.

Written Instruments.—It is the province of the court to construe written instruments, but where they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted: *Primm v. Haren*, 27 Mo. 205. The construction and true interpretation of commercial correspondence may under proper circumstances be left to the jury: *Fagin v. Connolly*, 25 Id. 94; or when an undated instrument was made: *Coons v. Chambers*, 1 Abb. Pr. 165. It is for the jury to determine whether the note tendered in part payment for a horse was the note understood and intended by the parties in their contract: *Fenton v. Perkins*, 3 Mo. 23.

court.¹ When there is both a demurrer and an answer to the same complaint, the issue of law raised by the demurrer must be first disposed of.² Where the law applicable to a case has been altered by the legislature pending the action, the court will dispose of issues of law arising on a demurrer according to the law at the time of the trial of the issues, if it does not appear upon the face of the complaint when the action was commenced.³ When the answer contains legal and equitable defenses, the court may first try the equitable defense, and refuse plaintiff a jury trial, and if the facts warrant, grant the equitable relief prayed for.⁴ It should distinctly appear from the record that the equitable defenses were first tried and disposed of, or if the whole action and all the issues were tried and submitted together, the fact should appear.⁵ But the objection that an equitable defense was not first disposed of can not be raised for the first time on appeal.⁶ Where there are both issues of fact and of law, and the former have been first tried, it will be presumed that the court so directed, if nothing appears to show that objection was made at the time of the trial.⁷ An answer in forcible detainer which denies that defendant "unlawfully entered" admits the entry, and raises an issue only on its lawfulness."⁸ Various illustrations of mixed issues of law and fact are cited in the note.⁹

§ 4618. **Special Issues.**—A special issue is one produced upon a special plea,¹⁰ and is usually more specific and particular than the general issues.¹¹ A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be

144. Whether an indorsement on a note has been erased: *Swan v. O'Fallon*, 7 Id. 231; whether an alteration appearing upon the face of an agreement was made before or after its execution: *Pringle v. Chambers*, 1 Abb. Pr. 58; *Maybee v. Sniffen*, 2 E. D. Smith, 1. The question of the identity of a written instrument is for the jury: *Jackson v. Betts*, 6 Cow. 377; *Bank of Cape Fear v. Gomez*, Id. 435.

¹ Cal. Code C. P., sec. 592; N. Y. Code, sec. 966; Laws of Oregon, sec. 174.

² *Brooks v. Douglass*, 32 Cal. 208.

³ *Smith v. Holmes*, 19 N. Y. 271; *Lewis v. City of Buffalo*, 29 How. Pr. 335.

⁴ *People v. Lafarge*, 3 Cal. 130; *Bodley v. Ferguson*, 30 Id. 511.

⁵ *Martin v. Zellerbach*, 38 Cal. 319.

⁶ *Tormey v. Pierce*, 42 Cal. 338.

⁷ *Fry v. Bennett*, 9 Abb. Pr. 45.

⁸ *Leroux v. Murdock*, 51 Cal. 541.

⁹ *Association*.—That the company was illegally associated is a mixed question of law and fact: *Ransford v. Copeland*, 6 Ad. & El. 482.

Delivery and Change of Possession: *Vance v. Boynton*, 8 Cal. 554.

Insolvency.—The question of the insolvency of the maker of a promissory note, not negotiable under the statute, in suit against the indorser: *Pococke v. Blount*, 6 Mo. 338.

New Promise.—Where there is a dispute as to the facts, whether a sufficient promise has been made to take the case out of the statute: *Clarke v. Dutcher*, 9 Cow. 675.

¹⁰ Steph. Pl. 162.

¹¹ Id.

tried; and such order is the only authority necessary for a trial.¹ The court may direct an issue to be framed upon the pleadings and submitted to the jury.² But it is not a matter of right in equity cases.³ And such special issues framed by the court according to chancery practice may be tried by a jury in equity cases.⁴ But where several defenses, some legal and some equitable, are interposed, it is irregular for the court to frame special issues involving all these, and submit them together to a jury.⁵ When, upon the coming in of the report of an auditor, either party desires to try the case by a jury, if there has not been an issue of fact joined between the parties, suitable issues should be made up under the direction of the court.⁶ The proper mode of making up such an issue is for the party having the affirmative to file an allegation of the facts which he asserts, and for the other party to traverse it. It is not a proper course for a party to traverse the conclusions of the auditor.⁷ When, in a suit on a promissory note, one of the issues is whether or not the plaintiff is the owner and holder, and special issues are submitted to the jury, which do not constitute a defense if the plaintiff is such owner and holder, and the jury find on the special issues only, it is error to render judgment for the plaintiff, until there is a finding on the issue of ownership.⁸

CHAPTER II.

TRIAL IN GENERAL.

§ 4619. **In General.**—After the complaint and answer are filed in the action, and all demurrers, motions to strike out, to amend the complaint or answer, and all other incidental motions are disposed of, the cause is at issue and ready for trial. All actions are tried in one of three ways: 1. If it be an action at law, and a jury is not waived, it will be tried by a jury; 2. All equity actions are tried by the court; 3. Trial by referee, which is generally done by consent of counsel, and order of reference being made in pursuance of such consent.⁹ It is not within the scope of this work to go beyond the plain letter of the law relative to any matter of pleading or of practice. Yet the question

¹ Cal. Code C. P., sec. 309.

² Curtis v. Sutter, 15 Cal. 263.

³ Moffat v. Moffat, 10 Bosw. 468; Moffat v. Mount, 17 Abb. Pr. 4; McCarty v. Edwards, 24 How. Pr. 236.

⁴ Brewster v. Bours, 8 Cal. 505.

⁵ Weber v. Marshall, 19 Cal. 447.

⁶ Brewer v. Hyndman, 18 N. H. 9.

⁷ Id.

⁸ Kiel v. Reay, 50 Cal. 61.

⁹ See Cal. Code C. P., sec. 592.

of properly and safely trying causes is one of much importance. Experience has taught the profession that there are really but two avenues open for success at the bar relative to the practice of the law: the one is to get correctly into court, the other is to get safely out of court; in other words, one is to draw the pleadings correctly, and the other to properly present the facts of the case and preserve all the legal rights of the party represented in the course of the trial. In either branch, the evidence of success is the result. By result is meant the final result; for it is one thing to win a cause, and quite another thing to win it and yet keep the record free from error, so that on appeal the judgment below will not be reversed. Remote as well as immediate consequences must be guarded against. He who tries his cause with the sole idea of gratifying the prejudices of listening friends, or of tickling the ears of unlearned jurors, often in the end loses what a more careful and less ornate display might have secured to his client.

§ 4620. **Duties of Clerk.**—The clerk must enter all causes on the calendar of the court according to the date of issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, must remain upon the calendar from court to court until finally disposed of.¹ Counsel have a right to rely on the presumption that the causes upon the calendar will be heard in their regular order, and to act upon that belief in calculating how long they will have for preparation.² The clerk must keep, among the records of the court, a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein.³ When a jury is waived, and the whole case is tried before the court, the record should show whether the trial was confined to the equitable defenses alone, or included all the defenses in the cause. It should distinctly appear that the equitable defenses were first tried and disposed of, or if all the issues were tried and submitted together, that fact should appear. In the natural order, it is the duty of the court first to try and decide upon the equitable defense before proceeding with the action at law. So held in an action where the judgment enjoined the plaintiff from setting up a particular title, without finally deciding the title or right of possession of the parties to the land in controversy.⁴

¹ Cal. Code-C. P., sec. 593.

³ Cal. Code C. P., sec. 1052.

² Belmont v. Erie R. R. Co., 52 Barb. 637.

⁴ Martin v. Zellerbach, 38 Cal. 300.

§ 4621. **Continuance.**—The cause having come on for trial, one of the parties, not being ready for such trial, can move the court, upon affidavit, for a continuance on any one of the following grounds: 1. Absence of witnesses or witness; 2. For any other reason which would, if the case were forced to trial, be subversive of the ends of justice—*e. g.*, sickness of counsel, or of the parties, or a party to the action, etc.

Courts usually require, and ordinarily should require, a showing to be made by affidavits, in order to continue causes for the term, when such continuance is objected to by either party; but when a state of affairs exists that is notorious, and about which there could be no conflict (*e. g.*, the destruction by fire of so much of the city where the court was held, as to render it impossible to find a suitable room in which the court could meet), the court is authorized of its own motion to continue the causes for the term.¹ The granting or refusing a continuance is in the sound discretion of the court, and not subject to review, except in cases of gross abuse of that discretion.² They are extremely liberal in granting adjournments.³ It is error to refuse a continuance when a good cause is shown.⁴ But even where the action of the court in refusing a continuance approaches an arbitrary exercise of discretion, the proper course of the party is to move for a new trial.⁵ And the only way of presenting an order refusing a continuance for review is by bill of exceptions.⁶ A continuance relating back may be entered at any time to effect the purposes of justice.⁷

§ 4622. **Affidavit for Continuance.**

Form No. 1130.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

¹ *Ex parte Larkin*, 11 Nev. 90.

² Consult the following authorities on the subject: *Frank v. Brady*, 8 Cal. 47; *Musgrove v. Perkins*, 9 Id. 211; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Id. 161; *People v. Gaunt*, 23 Id. 156; *Griffin v. Pohlemus*, 20 Id. 180; *Hastings v. Hastings*, 31 Id. 95; *Harper v. Lamping*, 33 Id. 641; *Carey v. P. & C. Petroleum Co.*, Id. 694; *Freleigh v. State*, 8 Mo. 606; *Scogin v. Hudspeth*, 3 Id. 123; *Chambers v. Lane*, 5 Id. 289; *Beatty v. Sylvester*, 3 Nev. 228; *Choat v. Bullion Min. Co.*, 1 Id. 75; *Ogden v. Payne*, 5 Cow. 15; *Barker v. Haskell*, 9 Cush. 218; *Leggett v. Boyd*, 3 Wend. 376; *Congar v. Galena*, etc. R. R. Co., 17 Wis. 477; *Berger*

v. Harrison, 1 Overt. 483; *Evans v. Bolling*, 5 Ala. 550; *Planters' and Merchants' Bank v. Walker*, 7 Id. 926; *Dulany v. Boston*, 2 Harr. (Del.) 350; *Campbell v. Strong*, Hempst. 265; *McCracken v. Church*, 1 A. K. Marsh. 273; *People v. Lewis*, 1 West Coast Rep. 131; *Alden v. Carpenter*, Id. 598; *Fleming v. Hawley*, 3 Id. 675.

³ *Turner v. Morrison*, 11 Cal. 21.

⁴ *Moore v. McCulloch*, 6 Mo. 444; *Tunstall v. Hamilton*, 8 Id. 500.

⁵ *Pilot etc. Co. v. Chapman*, 11 Cal. 161.

⁶ *Jacks v. Buell*, 47 Cal. 162; *People v. Ashnauer*, Id. 98.

⁷ *Sheppard v. Wilson*, 6 How. U. S. 260.

I. That he is the defendant in the above-entitled action.

II. That he has fully and fairly stated the case in this action to E. F., his counsel, who resides at [state residence of counsel], and after such statement, he is advised by his said counsel, and verily believes, that he has a good and substantial defense to said action on the merits.

III. That he can not safely go to trial at this term of this court, on account of the absence of and, who are material witnesses for defendant.

IV. That subpoenas in said cause were duly issued by the clerk of this court, and by this defendant placed in the hands of, the sheriff of said county, on the day of, 18.., for service on said and

V. That on the day of, 18.., said subpoenas were personally served on the said and, in said county.

VI. That said subpoenas required the said witnesses to be present in the court at the hour of o'clock, A. M., of this the day of, 18.., to testify on behalf of defendant.

VII. That the evidence of each of said witnesses is material for defendant's defense.

VIII. That he will prove by said witnesses [here state the evidence each will give, naming him].

IX. The said facts, which defendant can prove by said witnesses, can not, to his knowledge, be proved by any other persons.

X. This application is not made for delay merely, but that justice may be done in the premises; and affiant verily believes that if this cause be continued for this term of this court, he will be able to have the said witnesses present at the next term thereof.

[JURAT.]

[SIGNATURE.]¹

§ 4623. **Affidavit must State:**—1. That the evidence designed to be obtained is material;² 2. That the evidence designed to be obtained is not cumulative, or that affiant can not prove

¹ As to the postponements in justices' courts, see Cal. Code C. P., secs. 873 to 877. No notice of an application for continuance is generally given; the application is generally made when the cause comes on for trial; sometimes, however, the application is made before the day of trial, so that no preparation for trial need be made.

² Cal. Code C. P., sec. 595; Hawley v. Stirling, 2 Cal. 470; Berry v. Metzler, 7 Id. 418; Harper v. Lamping, 33 Id. 641; People v. Williams, 43 Id. 344; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Bruton v. State, 21 Tex. 337; McDonald v. Smith, 21 Ark. 460; Fake v. Edgerton, 6 Duer, 653.

the same matters by other witnesses;¹ 3. That he can not safely proceed to trial without his evidence;² 4. The affidavit should show that there is a reasonable prospect of obtaining the testimony at some future time;³ an affidavit which states that the applicant knows of no witnesses in the state by whom the material facts can be proved is insufficient;⁴ 5. That due diligence has been used to procure the witness,⁵ and the character of that diligence,⁶ and also that the witness can not be readily reached by attachment;⁷ and the court may also require the moving party to state on affidavit the evidence which he expects to obtain;⁸ 6. That application is not made for delay merely;⁹ 7. That a party has a good and substantial cause of action, or defense on the merits.¹⁰ Where an affidavit for a continuance was filed, the court should not permit it to be strengthened by other affidavits of the same person.¹¹

§ 4624. **Continuance, when Refused.**—A continuance will not be granted solely to allow a party to obtain evidence on a point rendered immaterial by his own answer.¹² Continuance will not be granted to the prejudice of the opposite party when the applicant has been guilty of negligence.¹³ A party who takes no steps to obtain the deposition of a witness whom he knows to be a sea-faring man is not entitled to a continuance for absence of such witness.¹⁴ So where a party neglects to subpoena a witness, relying on his promise to attend.¹⁵ Where the absent witness was a fugitive from justice, and there was no probability of his presence at the next term, and his deposition taken at examination might have been used by the party applying for a continuance, there was no error in refusing the application.¹⁶ Nor will the court abuse its discretion in refusing a continuance where the facts shown on the application cast suspicion on the good faith of the applicant.¹⁷

¹ *People v. Quincy*, 8 Cal. 89; *Pierce v. Payne*, 14 Id. 419; *People v. Gaunt*, 23 Id. 156; *Pope v. Dalton*, 31 Id. 218.

² *Harrell v. Durrance*, 9 Fla. 490.

³ *Richardson v. People*, 31 Ill. 170; *Harper v. Lamping*, 33 Cal. 641; *People v. Ashnauer*, 47 Id. 98; *People v. Cleveland*, 49 Id. 577; *State v. Rosemurgey*, 9 Nev. 308.

⁴ *Thompson v. Lord*, 14 Iowa, 591.

⁵ Cal. Code C. P., sec. 595; *Kuhland v. Sedgwick*, 17 Cal. 123; *People v. Williams*, 24 Id. 31; *Kelly v. Saunders*, 35 Mo. 200; *Miles v. Danforth*, 32 Ill. 59; *Mugg v. Graves*, 22 Ind. 236.

⁶ *People v. Thompson*, 4 Cal. 240.

⁷ *People v. Weaver*, 47 Cal. 106.

⁸ Cal. Code C. P., sec. 595; *Bruton v. State*, 21 Tex. 337; *Winslow v. Bradley*, 15 Wis. 394.

⁹ *People v. Thompson*, 4 Cal. 238.

¹⁰ *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

¹¹ *The State v. Buckner*, 25 Mo. 167.

¹² *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

¹³ *Dulany v. Boston*, 2 Harr. (Del.) 350.

¹⁴ *Deanes v. Scriba*, 2 Call, 415.

¹⁵ *Freeland v. Howell*, Anth. N. P. 272.

¹⁶ *People v. Cleveland*, 49 Cal. 577.

¹⁷ *People v. Mortimer*, 46 Cal. 114.

§ 4625. **Costs.**—In general, taxable costs are the only terms, payment of which should be imposed as a condition of putting off a trial.¹ And only costs incurred with reference to the particular circuit.² And when, after postponement on defendant's application, the cause went over again because of the judge's illness, he was not properly chargeable with costs of the circuit.³ So where the cause goes off at the circuit because plaintiff is not ready.⁴

§ 4626. **Election Cases.**—The county judge, at chambers, has no power to grant a continuance in an election contest, where trial was set at a future day.⁵

§ 4627. **Grounds for Continuance.**—The absence of evidence is a ground for continuance. The same in actions of an equitable as in those of a legal character.⁶ But a continuance for absence of witness will not be granted where only two days have intervened between issuance of subpoena and application for continuance, and the witness resided in a remote part of the county.⁷ Nor where the affidavit states that subpoenas for the absent witnesses had been placed in the sheriff's hands four days before the application, but that he had been unable to find the witnesses.⁸ Newly discovered evidence is also a ground for continuance.⁹ So surprise is a ground for continuance.¹⁰ As by withdrawal of demurrer, and a replication filed in its stead.¹¹ Or where a pleading is amended in a matter of substance.¹² So on reapportionment of causes.¹³ Absence of counsel on account of sickness, and where other competent counsel can not be had, is a good ground for continuance.¹⁴ So where counsel is absent on account of sickness in his family, and the party knows nothing of it until the morning of the trial, the court should at least continue the cause until other counsel can familiarize themselves with the facts.¹⁵ The attendance of a member of the legislature on its session may be a ground for a continuance of a cause in which he is a defendant.¹⁶ But it has been held in California that the voluntary absence of a defendant on impor-

¹ Hall v. Dwinell, 10 Wend. 628; Patton v. Blackwell, 2 Overt. 114.

² Morell v. Gould, 5 Hill, 553.

³ Hanford v. McNair, 2 Wend. 286; Bagley v. Ostrom, 5 Hill, 516.

⁴ Jackson v. Bresse, 6 Cow. 42.

⁵ Norwood v. Kenfield, 34 Cal. 329.

⁶ Howard v. Freeman, 3 Abb. Pr., N. S., 292.

⁷ Parker v. Campbell, 21 Tex. 763.

⁸ Jacks v. Buell, 47 Cal. 162.

⁹ Berry v. Metzler, 7 Cal. 418; Allcorn v. Rafferty, 4 J. J. Marsh. 220.

¹⁰ Ross v. Austill, 2 Cal. 183; People v. Holden, 28 Id. 124; Schellhous v. Ball, 29 Id. 608; cited in Doyle v. Sturla, 38 Id. 456.

¹¹ Risher v. Thomas, 1 Mo. 739.

¹² Tunstall v. Hamilton, 8 Mo. 500; Tourtelot v. Tourtelot, 4 Mass. 506.

¹³ Elliott v. Cadwallader, 14 Iowa, 67.

¹⁴ People v. Logan, 4 Cal. 188.

¹⁵ Thompson v. Thornton, 41 Cal. 626.

¹⁶ Johnson v. Offutt, 4 Metc. (Ky.) 19.

tant business is no ground for a continuance.¹ A cause may be continued after a hearing for further proof.² In Vermont, where all the parties in interest are not before the court, the case may be continued to bring them there.³ And where, in a suit against partners on a joint claim against them, it appeared that one had been declared bankrupt, but had not yet obtained his discharge, and the case was continued as to him, it was held, on motion for continuance by the other partner, that the cause could not proceed as to him until the disposition of the bankrupt proceedings against his copartner.⁴

§ 4628. **Insufficient Grounds.**—Voluntary absence of defendant on important business is no ground for continuance.⁵ Nor is mistaken advice of counsel to his client not to prepare for trial.⁶ Voluntary absence of attorney is no cause for continuance.⁷ When, through the inadvertence of a party, he is unable to produce evidence which is in his own possession, no continuance will be granted.⁸ The absence of a transient witness, whom the party had no opportunity of examining before the trial, is no excuse for putting off the trial. It is no ground for a continuance that a material witness for the applicant is in another county in this state, where the applicant has taken no steps to procure his deposition, because he saw the witness several weeks before, and the witness promised to be present at the trial.⁹ Nor that the applicant was informed by his attorneys, several weeks before the term, that the case could not be tried at that term, and that such attorneys reside at a great distance, and are not present, and their attendance can not be procured.¹⁰

§ 4629. **Insufficient Statement.**—In application for continuance, the allegation that a party has used all the diligence in his power is not sufficient: it should be shown to the court of what such diligence consisted; whether by exhausting the process of the court, or otherwise.¹¹ For the same reason, if a party states, on information and belief, that he can procure the personal attendance of a witness from a distant foreign country, he should set forth the reasons for the belief, and the nature of his information, that the court may decide whether or not there is reasonable ground to believe that the witness will attend.¹² Inconvenience to prepare for hearing is not a good ground for

¹ *Wilkinson v. Parrott*, 32 Cal. 102.

² *Washburn v. Holmes, Wright*, 67.

³ *Beardsley v. Knight*, 10 Vt. 185.

⁴ *Tinkum v. O'Neale*, 5 Nev. 93.

⁶ *Wilkinson v. Parrott*, 32 Cal. 102.

⁸ *Musgrove v. Perkins*, 9 Cal. 211.

⁷ *Haight v. Green*, 19 Cal. 113; *Adams v. Adams*, 1 Duval, 167.

⁸ *Kuhland v. Sedgwick*, 17 Cal. 123.

⁹ *Lightner v. Menzel*, 35 Cal. 452.

¹⁰ *Id.*

¹¹ *People v. Thompson*, 4 Cal. 241.

¹² *People v. Francis*, 38 Cal. 183.

postponement of the argument.¹ Where, however, the affidavit for continuance failed to show the materiality of the testimony of the absent witness, but it appeared that the court in deciding the motion assumed that it did, and no objections were made on that ground by the opposite party, it was held that the objection could not be made for the first time on appeal.²

§ 4630. **Stipulation.**—A continuance may be granted on consent of parties, reduced to written stipulations therefor; but an agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the court.³ In justices' courts the court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.⁴ A defendant dangerously ill may be required, as a condition of postponing the trial, to stipulate that his death before the next circuit shall not abate the cause.⁵

§ 4631. **Preventing a Continuance.**—If the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.⁶ The affidavit thereupon becomes evidence, but not conclusive proof of its contents.⁷ The admissions of a party wishing to avoid a continuance must be broad enough to cover all the material facts to which the absent witness would testify, as alleged in the affidavit for a continuance.⁸ The admission of counter-affidavits, on a motion for a continuance, is in the sound discretion of the court.⁹ Where a continuance was granted for seven days, in an election contest, against the objections of respondent, and without affidavits, it was held that it operated a discontinuance of the proceeding.¹⁰

§ 4632. **Waiver of Rights.**—Where the plaintiff to an action, with full knowledge of his right to proceed to trial only at his own option, against the defendants served, and of the fact that no service had been made upon one of the defendants, who had left the state, and that no issue had been joined as to him; first agreed with the defendants served, without reservation, that the issue between him and them should be set for trial at a particular day, then asked and obtained a continuance,

¹ *Bank of Salina v. Alvord*, 32 N. Y. 684.

² *State v. Chapman*, 6 Nev. 320.

³ *Peralta v. Marica*, 3 Cal. 187.

⁴ Cal. Code C. P., sec. 875.

⁵ *Ames v. Webbers*, 10 Wend. 575.

⁶ Cal. Code C. P., sec. 595; *Boggs v. Merced Min. Co.*, 14 Id. 358; *O'Neil*

v. N. Y. & Silver Peak Min. Co., 3 Nev. 141.

⁷ Id.

⁸ *Peck v. Lovett*, 41 Cal. 521.

⁹ *Riggs v. Fenton*, 3 Mo. 28; *Anon.*, 3 Day, 308.

¹⁰ *Keller v. Chapman*, 34 Cal. 635.

for the reason solely that his witnesses were not present, and in consideration of such continuance, by consent, agreed of record that the case should be set for trial and be tried on a particular day: it was held that this state of facts clearly constituted a waiver by plaintiff of his right to delay the trial until said other defendant had been served or issue joined in respect to him.¹

CHAPTER III.

TRIAL BY THE COURT.

§ 4633. **In General.**—Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require.² In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.³ Waiver of jury trial must appear affirmatively and not by implication.⁴ And notwithstanding the waiver, the court may direct an issue of fact to be tried by a jury.⁵

Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions:⁶ 1. By failing to appear at the trial. So in replevin, when the action is called;⁷ and filing an answer does not operate as an appearance at the trial.⁸ 2. By written consent, in person or by attorney, filed with the clerk. 3. By oral consent in open court, entered on

¹ Meagher v. Gagliardo, 35 Cal. 602.

² Cal. Code C. P., sec. 594.

³ Cal. Code C. P., sec. 592.

⁴ Smith v. Polack, 2 Cal. 92; see also Russell v. Elliott, 2 Id. 245; and Exline v. Smith, 5 Id. 112; but see Cal. Code C. P., sec. 631; and Doll v. Anderson, 27 Cal. 248.

⁵ Id.

⁶ Cal. Code C. P., sec. 631.

⁷ Waltham v. Carson, 10 Cal. 178; in ejectment, in Doll v. Feller, 16 Id. 433; and generally, Gillespie v. Benson, 18 Id. 409.

⁸ Zane v. Crowe, 4 Cal. 112.

the minutes.¹ Equitable cases are properly triable by the court, and the trial of issues of fact by a jury can not be claimed as of right, but rests in the discretion of the court;² and in chancery cases parties are not entitled to a trial by jury.³ And in such cases the court may disregard the verdict of a jury.⁴ In a suit between partners for a dissolution, accounting, etc., where there are questions of fact which might properly be tried by a jury, yet if the cause is actually tried by the court, and all the testimony in, and the cause finally submitted to the court for its determination, it is then too late to order a trial by jury. It is the duty of the judge to decide the questions submitted, and it is the right of the parties respectively to have such decision.⁵ But it is no error for a judge to hear arguments at chambers after a cause has been submitted to him, and thereupon decide the case.⁶ In Missouri, proceedings against a constable for delinquency must be heard by the court.⁷ In a case for specific performance and damages, where specific performance can not be adjudged, the case may be retained and sent to a jury to award damages.⁸ And so in a case to reform a policy and recover for a loss.⁹ Both legal and equitable relief may be sought in the same action, but when plaintiffs move a trial at a special term, and defendants demand a jury trial, the court should direct the cause to be tried by the jury.¹⁰ So relief was refused and complaint dismissed where plaintiff elected to sue as in equity, and then, on failure at trial, wished the case retained and tried as at law.¹¹ On mixed issues involving a demand for equitable relief or damages, the case retained and sent to a jury after failure to establish former demand, on trial by the court.¹²

§ 4634. **Findings by the Court.**—Upon the trial of a question of fact by the court, its decision must be given in writing, and filed with the clerk, within thirty days after the cause is submitted for decision.¹³ The above section is directory as to

¹ Cal. Code C. P., sec. 631; 2 Whitt. Pr. 220; 2 Till. & Shear. Pr. 428.

² Moffat v. Moffat, 10 Bosw. 468; 17 Abb. Pr. 4; McCarty v. Edwards, 24 How. Pr. 236.

³ Walker v. Sedgwick, 5 Cal. 192; Cahoon v. Levy, Id. 294; Koppikus v. State Capitol Commissioners, 16 Id. 248.

⁴ Goode v. Smith, 13 Cal. 84.

⁵ O'Brien v. Bowes, 4 Bosw. 657.

⁶ City of San Jose v. Shaw, 45 Cal. 178.

⁷ Hart v. Robinett, 5 Mo. 11; Hart v. Spence, Id. 17.

⁸ Barlow v. Scott, 24 N. Y. 40;

Stevenson v. Buxton, 37 Barb. 13; 15 Abb. Pr. 352; see also See v. Part-ridge, 2 Duer, 463.

⁹ N. Y. Ice Co. v. N. West. Ins. Co., 23 N. Y. 357; S. C., 12 Abb. Pr. 414; S. C., 21 How. Pr. 296, reversing 10 Abb. Pr. 34; Van Valen v. Lapham, 13 How. Pr. 240; and overruling Van Beck v. Village of Rondout, 15 Abb. Pr. 48.

¹⁰ Davis v. Morris, 36 N. Y. 569.

¹¹ Craig v. Hyde, 24 How. Pr. 313.

¹² Genet v. Howland, 45 Barb. 560; S. C., 30 How. Pr. 360.

¹³ Cal. Code C. P., sec. 632; McKeon v. McDermott, 22 Cal. 667.

the time required for the written decision to be filed.¹ This section is applicable to cases both at law and in equity,² but does not apply in cases of nonsuit.³ If the judge should discover a clerical mistake in his findings, or that he had inadvertently committed an error, and should correct it at the same term, before the entry of judgment, while the proceeding is still *in fieri*, and in such a manner as not to deprive the party of opportunity to move for a new trial, or abridge the time for motion for new trial, or cause him to lose any other right thereby, a new trial should not be granted on that ground.⁴ The judge who tried the case without a jury did not file his findings of the facts until after the judgment was entered: it was held not to be error.⁵ But a judge can not change his findings of facts in a material particular after the entry of judgment on the findings and the adjournment of the term.⁶

§ 4635. Findings in Action for Divorce.

Form No. 1131.

[TITLE.]

This cause having been heretofore, on the day of, 18.., submitted to the court for decision upon the complaint of the plaintiff, and the answer and cross-complaint of the defendant herein filed, and the report of G. H., esq., court commissioner of this court, to whom the said cause was referred to take and report in writing the testimony of the parties, by order entered the day of, 18.., after hearing the arguments of counsel for the respective parties, and the court being fully advised, now finds the following facts:

I. The plaintiff and defendant were married, one with the other, at Washoe county, Territory of Nevada, on the day of, 18..; and cohabited together as husband and wife from thence until the day of, 18..

II. That both the plaintiff and defendant are *bona fide* residents of the state of, and have so resided in this state for more than six months continuously next before the commencement of this action and the filing of the complaint herein; and that at the time of the commencement of this action the said plaintiff was a *bona fide* resident of the city and county of

¹ McQuillan v. Donahue, 49 Cal. 157; People v. Dodge, 5 How. Pr. 47; Lewis v. Jones, 13 Abb. Pr. 427.

² Lyons v. Lyons, 18 Cal. 447; see also Duff v. Fisher, 15 Id. 375; Stewart v. Slater, 6 Duer, 83, 102; Burger v. Baker, 4 Abb. Pr. 11.

³ Gilson R. M. Co. v. Gilson, 47 Cal. 597.

⁴ Prince v. Lynch, 38 Cal. 531.

⁵ Vermule v. Shaw, 4 Cal. 214; cited in Keller v. Sutrick, 22 Id. 473.

⁶ Carpentier v. Gardiner, 29 Cal. 160.

III. That the plaintiff and defendant have two children, issue of said marriage, viz., T. U., aged years, and V. W., aged years.

IV. That between the day of, 18.., and the day of, 18.., at a lodging-house, street, in the city of, the plaintiff, A. B., committed adultery with one, and lived during said time in adulterous intercourse with him. That on the day of, 18.., or thereabouts, the plaintiff, A. B., lived in a house of prostitution, No., street, in said city and county of, said house being kept by one, and then and there repeatedly committed adultery with divers persons, and earned a livelihood by habits of prostitution.

V. That the plaintiff and defendant have not cohabited with each other since the day of, 18.. That each and every of said acts of adultery was committed without the consent, connivance, privity, or procurement of the defendant, and that the defendant has not cohabited with the plaintiff since his discovery of said adultery.

VI. That the plaintiff is, and has been for a long time past, an abandoned woman, addicted to the use of intoxicating drinks, and that she is a person by character, disposition, conduct, temper, and passions wholly unfit to have the care, custody, or management of children.

VII. That the property mentioned and described in the complaint is community property, and is of the value of dollars.

As conclusions of law from the foregoing facts, the court finds:

I. That the defendant is entitled to a decree of this court dissolving the bonds of matrimony heretofore existing between plaintiff and defendant, decreeing the plaintiff and defendant each to be freed and absolutely released from the bonds of matrimony, and all the obligations thereof.

II. That the defendant, C. D., is entitled to be awarded the sole charge, control, and custody of the children, issue of said marriage.

L. M.,

[DATE.]

Judge.

§ 4636. Findings in Action to Quiet Title.

Form No. 1132.

[TITLE.]

This cause having been called regularly for trial before the court (a jury trial having been expressly waived by stipulation in writing of the respective parties appearing therein) [or as the case may be], E. F. appeared as attorney for the plaintiff, and

G. H. appeared as attorney for defendant. And the court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

I. That the plaintiff entered into actual possession of all the lots, land, and premises described in the complaint, on or about . . . day of . . . , in the year of our Lord one thousand eight hundred and . . . , claiming it in his own right; and the said plaintiff has, ever since the date last aforesaid, occupied, used, and cultivated said land, having and keeping the same surrounded by a substantial inclosure, using and claiming the same, in his own right, from that date to the present time, adversely to all the world, and especially as against the defendants.

II. That neither one of all the defendants mentioned in the complaint, nor any grantor or predecessor of any of said defendants, has been in the possession of any part of said premises since the . . . day of . . . , 18..; and that the plaintiff first entered upon said premises justly and lawfully, and not as a trespasser as against the rights of any or either of said defendants, or of those under or through whom they claim.

III. That the whole of the land described in the complaint lies within the city and county of San Francisco, and within the limits of what is usually and properly known as and called the Van Ness ordinance.

IV. That all the allegations and averments of the plaintiff's complaint are true, and all the denials and allegations of the defendant's answer are untrue.

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

I. That the plaintiff is the owner in fee simple and entitled to the possession of all the lots, tracts, and parcels of land, as the same are described in his complaint on file herein, as against the defendants all and severally, and all persons claiming or to claim the same, or any part of said land, under them, the said defendants, or either of them, and that neither one of said defendants has any right, title, or interest in or to said land, or any part thereof.

II. That the plaintiff is entitled to a decree, as prayed for in his complaint, to quiet his title to said land, against said defendants, and each of them, and all persons claiming or to claim

the same, or any part thereof, under or through the said defendants, or either of them.

III. That the plaintiff is entitled to a judgment for costs, to be taxed herein against only the defendants who have answered herein contesting plaintiff's rights in said premises; and as to the other defendants who have not answered, or who have answered disclaiming, costs are not to be taxed.

And judgment is hereby ordered to be entered accordingly.

[DATE.]

[SIGNATURE.]¹

§ 4637. **Findings on Contract.**—In an action on contract, the question of waiver being within the issue, and the facts being all before the referee, it was held that his finding on the question should be sustained, although the question was not distinctly raised by the pleadings.² In an action to recover judgment against a municipal corporation for work done on contracts, and warrants issued therefor, if the court finds that the warrants issued were issued after the accounts under the contract were audited, and were issued in consideration thereof, it is a sufficient finding that the warrants were drawn for the amount due on the contracts.³ Where the defendant's liability depends entirely upon the fact of his indebtedness to a third party, the fact of his indebtedness is the only fact to be found.⁴

§ 4638. **The Same—Conversion.**—The legal effect of findings for the defendant, on the question of the plaintiff's right to the property, was to entitle the defendants from whom the property was taken to its restoration.⁵ A finding that hay, alleged to have been converted, was worth twenty dollars a ton, without finding the number of tons converted, does not entitle plaintiff to a judgment.⁶

§ 4639. **The Same—Ejectment.**—If the court, in ejectment, finds that the defendant has no right or title to the premises, or to the possession thereof, and plaintiff is a tenant in common in the premises with the estate of a deceased co-tenant, and the parties stipulated during the trial, as a substitute for evidence on this point, that the defendant entered under a deed from the administrator of the deceased co-tenant, and by his permission, the finding is contrary to the evidence.⁷ When title is found in

¹ Where the answer sets up new matter, a finding that the allegations of the complaint are true is insufficient. The court should find also as to the new matter: *People v. Forbes*, 51 Cal. 628. And an omission to find upon a counter-claim is error: *Baggs v. Smith*, 53 Cal. 88.

² *Van Buskirk v. Stow*, 42 Barb. 9.

³ *Argenti v. San Francisco*, 30 Cal. 458.

⁴ *Smith v. Coe*, 29 N. Y. 666.

⁵ *Waldman v. Broder*, 10 Cal. 378.

⁶ *Troy v. Clarke*, 30 Cal. 419.

⁷ *Carpentier v. Small*, 35 Cal. 846.

one party, the court is not required to find the facts constituting the other party's claim of title, but if requested, the better practice would be to make such finding.¹ Where the court finds simply that the defendant was in possession at the date of the action, and that he wrongfully withheld the possession of the same from the plaintiff, it must be presumed at least in favor of the judgment that this holding was in subordination to the legal title.² The findings should state explicitly whether defendant was affected with notice of the fraud of those through whom he claimed title, where notice of such fraud is material.³ Where a party is in possession of an inclosed portion of a tract, claiming the whole under a deed, it is error in the court to find a constructive possession to the land outside of the inclosure where the grantor in the deed had not actual possession of the whole.⁷

§ 4640. **Facts, how Found.**—Where an answer does not deny the allegations of the complaint, but sets up new matter as a defense, a finding that the facts stated in the complaint are true is not a finding upon all the issues. The court should find upon the new matter.⁵ And omission to find upon a counter-claim is error.⁶ A finding which states only general conclusions, leaving it doubtful what particular facts were established, is defective, and a refusal to amend it on application is error.⁴ The finding of facts must be within the issues raised by the pleadings;⁸ and must cover all the issues,⁹ whether evidence upon an issue is introduced or not.¹⁰ Findings may refer to the pleadings, but the reference should be direct, and so as to leave no doubt.¹¹ Where facts are so obscurely found, or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, it will be disregarded as a finding of fact.¹² Only the ultimate facts should be found, and not the evidence.¹³

§ 4641. **Facts Left to Inference.**—To justify the supreme court in inferring a material fact not expressed in the findings,

¹ *Burke v. Table Mt. Wat. Co.*, 12 Cal. 403; *Meador v. Parsons*, 19 Id. 294; *Merrill v. Chapman*, 34 Id. 251.

² *Sharp v. Daugney*, 33 Cal. 505; *Chouquette v. Barada*, 23 Mo. 331.

³ *Chouteau v. Nuckolls*, 20 Mo. 442.

⁴ *Walsh v. Hill*, 38 Cal. 481.

⁵ *People v. Forbes*, 51 Cal. 628; *Phipps v. Harlan*, 1 Pac. C. L. J. 191.

⁶ *Baggs v. Smith*, 53 Cal. 88.

⁷ *Polkernus v. Carpenter*, 42 Cal. 375; *Ladd v. Tully*, 51 Id. 277.

⁸ *Morenhout v. Barron*, 42 Cal. 591; *Devoe v. Devoe*, 51 Id. 543; *Allison v. Darton*, 24 Mo. 343; *Farrar v. Lyon*, 19 Id. 122.

⁹ *Bosquett v. Crane*, 51 Cal. 505; *Rice v. Inskeep*, 34 Id. 225; *Downing v. Bourlier*, 21 Mo. 149.

¹⁰ *Speegle v. Leese*, 51 Cal. 415.

¹¹ *McEwen v. Johnson*, 7 Cal. 258; *Breeze v. Doyle*, 19 Id. 101; see also *Kelley v. McKibben*, 53 Cal. 13.

¹² *Figg v. Mayo*, 39 Cal. 262.

¹³ *Pico v. Cuyas*, 47 Cal. 174; but see *Coveny v. Hale*, 49 Id. 552.

from others which are expressly found, it must appear that the fact to be inferred follows inevitably from the facts found; that, upon every conceivable theory of the case, the non-existence of the fact to be inferred is inconsistent with the facts found. The object of the section of the code relating to findings,² is to do away with the doctrine of implied findings as based on the former statute, and to separate, for the facility of investigation, questions of fact and law.³ If the facts are found, it must affirmatively appear that they support the judgment.⁴

§ 4642. **Findings Conclusive.**—The finding of a court will not be disturbed, unless the evidence was such that, if the question at issue had been submitted to a jury, and they had rendered a verdict in accordance with the finding, the court would have set it aside as contrary to evidence.⁵ The application of the rule that findings will not be disturbed on appeal, when there is a manifest conflict in the evidence, depends in no measure upon the question whether any of the witnesses are interested in the event of the suit. The credit to be given to their testimony, however attacked, must be determined in the court below.⁶ If no motion is made for a new trial, the finding of the court and verdict of the jury are conclusive as to the facts.⁷ Or where they are not excepted to.⁸

§ 4643. **Findings Contrary to Admissions in the Pleadings.**—A finding contrary to facts admitted in the pleadings must be disregarded;⁹ and the judgment must follow such admissions.¹⁰

§ 4644. **Finding Contrary to Stipulation.**—If the finding of a fact on a material point is contrary to a stipulation of the parties made in the course of the trial as a substitute for evidence, a new trial will be granted, on the ground that the finding is contrary to the fact as stipulated, and therefore unsupported by the evidence.¹¹

§ 4645. **Findings are not Necessary** when the facts are admitted or not denied in the pleadings;¹² or when judgment is

¹ *Emmal v. Webb*, 36 Cal. 197.

² Cal. Code C. P., secs. 632, 633.

³ *Dowd v. Clarke*, 51 Cal. 262. For decisions under the former statute, see *Shelby v. Houston*, 38 Id. 410, and cases cited, 321.

⁴ *N. P. R. R. Co. v. Reynolds*, 50 Cal. 60.

⁵ *Moore v. Murdock*, 26 Cal. 514.

⁶ *Putnam v. Lamphier*, 36 Cal. 151; consult "Appeal."

⁷ *Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 Id. 108; *Duff v. Fisher*, 15 Id. 379; *Gagliardo v. Ho-*

berlin, 18 Id. 395; *Pico v. Cuyas*, 47 Id. 174.

⁸ *Gray v. Moss*, 34 Id. 125; but see Cal. Code C. P., sec. 647.

⁹ *Bradbury v. Cronise*, 46 Cal. 287.

¹⁰ *McDonald v. M. V. Homestead Ass.*, 51 Id. 210.

¹¹ *Carpentier v. Small*, 35 Cal. 346.

¹² *Swift v. Muygridge*, 8 Cal. 445; *Fox v. Fox*, 25 Id. 587; *Burnett v. Stearns*, 33 Id. 468; *Downer v. Sexton*, 17 Wis. 29; *Carlisle v. Mulhern*, 19 Mo. 56.

rendered on the pleadings;¹ or in case of nonsuit.² If illegal evidence is admitted on the trial, it is not error for the court to refuse to find a fact proved by such evidence.³

§ 4646. **Fraud.**—A special finding on the question of fraud should always be taken.⁴ Where an infant files a bill to set aside a decree for fraud in fact in procuring it, and for fraud because the decree does not reserve to the infant a day in court after coming of age to contest it, and the court finds against the infant on his charge of fraud in fact, the finding is conclusive of the whole case, unless there is a very clear mistake of the court as to the fact of fraud.⁵ In an action against an attorney to set aside certain conveyance of property made to him by his client, on the ground of fraud practiced by the attorney in their procurement, and inadequacy of consideration if to the contrary, it be found that said consideration was fair and adequate, and that the client was willing to sell the property, then the further finding by the court that there was no fraud practiced by the attorney becomes immaterial for all purposes of the appeal by plaintiff.⁶ In an action against a sheriff for wrongfully taking personal property, if he sets up that he took the same by virtue of an attachment, and that the goods were the property of the defendant in the attachment, and that he fraudulently sold them to this plaintiff, the court must find as to the issue of fraud thus raised.⁷

§ 4647. **General and Special Findings.**—When the court sits as a jury in the trial of a cause, it must in all cases find the facts specially.⁸ If discrepancy exists between the special and general findings in a case, the special findings must control.⁹ Findings stating: 1. That the material allegations in plaintiff's complaint and replication are true; 2. That the material allegations in defendant's answer are not true—are insufficient in not specifying distinctly the allegations which are material.¹⁰ So also a finding "that all the issues of fact raised by the pleadings are hereby found and decided in favor of the plaintiffs and against the defendant," is indefinite and insufficient.¹¹ It has been held, however, that a general finding by the court that "all the allegations and averments in plaintiff's complaint are

¹ Taylor v. Palmer, 31 Cal. 242; Nosler v. Haynes, 2 Nev. 56.

² Gilson R. M. Co. v. Gilson, 47 Cal. 597.

³ Hutchings v. Castle, 48 Cal. 152.

⁴ Davis v. Robinson, 10 Cal. 411; Gillan v. Metcalf, 7 Id. 137.

⁵ Regla v. Martin, 19 Cal. 463.

⁶ Kisling v. Shaw, 33 Cal. 425.

⁷ Harris v. Burns, 51 Cal. 528.

⁸ Breeze v. Doyle, 19 Cal. 101.

⁹ Leese v. Clark, 20 Cal. 387; Hidden v. Jordan, 28 Id. 301.

¹⁰ Breeze v. Doyle, 19 Cal. 101.

¹¹ Johnson v. Squires, 53 Cal. 37.

true, and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by said pleadings.¹

§ 4648. **Jurisdiction.**—If the findings of the court be that defendant was duly served with process, it is sufficient to establish the fact of jurisdiction on that ground.²

§ 4649. **Membership in Company.**—Where one defendant pleads that he is not a member of the company sued, and the court finds that the allegations of the complaint are true, and that he is a member of the company, as to plaintiff, Parke, the finding is sufficient.³

§ 4650. **Money Deposit.**—The finding of the court that money was deposited with one, to be held by him on deposit, and in trust for a party, is not open to the objection that it does not specify the kind of deposit.⁴

§ 4651. **Note.**—Where the declaration was upon a note, and the court found that the note was never given, but that the indebtedness was for merchandise sold, it was held that the finding was against the averment, and could not support the judgment.⁵

§ 4652. **Note and Mortgage.**—That "it appears from the note and mortgage sued on that there was due plaintiff, at the date of the commencement of this suit, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of two thousand dollars," it is ordered, etc., is a sufficient finding of the execution and delivery of the note and mortgage.⁶

§ 4653. **Practice on Findings.**—The court should first ask counsel on both sides if they desire findings, and if they do, reserve its judgment, and direct each side to prepare and submit such questions of fact as they desire to have found.⁷ And the party requiring a finding should specify the point upon which he desires it.⁸ The court may file written findings, whether requested or not.⁹ It is the right of the judge of the court to sign and file his finding, whether drafted by himself or another, without notice to the attorneys of the parties; and in doing so, his sole duty is to see that they are proper, and in conformity with his view of the facts and law of the case.¹⁰ Neither evidence, argument, nor comment has any legitimate place in findings of fact or law.¹¹

¹ *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30; *Downer v. Sexton*, 17 Wis. 29.

² *Lick v. Stockdale*, 18 Cal. 219.

³ *Parke v. Hinds*, 14 Cal. 415.

⁴ *Schroeder v. Jahns*, 27 Cal. 274.

⁵ *Lewis v. Myers*, 3 Cal. 475.

⁶ *Holmes v. West*, 17 Cal. 623.

⁷ *Tewksbury v. Magraff*, 33 Cal. 237.

⁸ *Miller v. Stern*, 30 Cal. 402.

⁹ *Gay v. Moss*, 34 Cal. 125.

¹⁰ *Hathaway v. Ryan*, 35 Cal. 188.

¹¹ *Glacius v. Black*, 50 N. Y. 145.

§ 4654. **Presumptions.**—That the findings were supported by the evidence,¹ and that evidence was competent and sufficient.² But where there is no issue tendered in the pleadings upon a material matter, the court or jury will not be presumed to have found on such matter.³ Where there is no finding of facts incorporated in the case, the presumption is that the decision thereon was correct.

§ 4655. **Separate Statement in Findings.**—In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.⁴ Facts must be found and set forth separately from the conclusions of law.⁵

§ 4656. **Sufficient Statement.**—A finding of facts which is a mere recital of evidence, and does not conclusively establish the fact in issue, is sufficient.⁷ And the findings should warrant the conclusions of law and judgment thereon.⁸ The facts, and not the evidence, should be set out.⁹ Facts found should not be mingled with argument.¹⁰ An opinion is not a finding;¹¹ but conclusions from facts are.¹² The opinions of the court, the reasons of the judge, or the evidence form no part of the findings.¹³ Where the fact found by the judge, and the very one, in his opinion, upon which the case turns, is wholly unsupported by evidence, the appellate court will not treat such findings as surplusage in order to sustain the judgment on other findings, especially if the weight of testimony is against the other findings.¹⁴

§ 4657. **Sufficiency, Test of.**—The true test of the sufficiency of the findings is this: Would they answer if presented by a jury in the form of a special verdict?¹⁵ Findings are suffi-

¹ *Owen v. Morton*, 24 Cal. 377; *Jenkins v. Frink*, 30 Id. 586.

² *Sears v. Dixon*, 33 Cal. 326.

³ *Gifford v. Carvill*, 29 Cal. 589; *Bernal v. Gleim*, 33 Id. 668.

⁴ *Viele v. Troy and Boston R. R. Co.*, 20 N. Y. 184; *Matthews v. Mayor of New York*, 14 Abb. Pr. 214; consult "Appeal."

⁵ Cal. Code C. P., sec. 633.

⁶ *Bryan v. Maume*, 28 Cal. 238; *Church v. Erben*, 4 Sandf. 691; *Peck v. Yorks*, 14 How. Pr. 416; *Ragan v. McCoy*, 26 Mo. 166; *Sutter v. Streit*, 21 Id. 157; see *Sharp v. Wright*, 35 Barb. 236.

⁷ *Coveny v. Hale*, 49 Cal. 552; *Thomas v. Sprague*, 12 Mich. 120.

⁸ *Pearce v. Burns*, 22 Mo. 577;

Pearce v. Roberts, Id. 582; *State v. Ruggles*, 23 Id. 339; see also, *Tomlinson v. Mayor of N. Y.*, 23 How. Pr. 452; *Rogers v. Beard*, 20 Id. 98.

⁹ *Heredink v. Holten*, 16 Cal. 103; *Kalkman v. Baylis*, 23 Id. 303; *Javens v. Harris*, 20 Mo. 262; *Murdock v. Finney*, 21 Id. 138; *Sutter v. Streit*, Id. 157.

¹⁰ *Bryan v. Maume*, 28 Cal. 238; *Jones v. Block*, 30 Cal. 227.

¹¹ *McClory v. McClory*, 38 Cal. 575.

¹² *Sears v. Dixon*, 33 Cal. 326.

¹³ *James v. Williams*, 31 Cal. 311; *Mills v. Thursby*, 12 How. Pr. 417; *Thomas v. Tanner*, 14 Id. 426; *Magie v. Baker*, 14 N. Y. 435.

¹⁴ *Lockhart v. Mackie*, 2 Nev. 294.

¹⁵ *Breeze v. Doyle*, 19 Cal. 101.

cient when they cover all the issues made by the pleadings, whether supported by the evidence or not.¹ It is sufficient if the findings are not repugnant to or inconsistent with the judgment.²

§ 4658. **Waiver.**—Findings of fact may be waived by the several parties to an issue of fact: 1. By failing to appear at the trial; 2. By consent in writing, filed with the clerk; 3. By oral consent in open court, entered in the minutes.³ On appeal, the party who asserts as error the failure of the court below to file findings of fact must make it affirmatively appear, by bill of exceptions or other appropriate method, that no waiver of findings had occurred, or the intendments must go to support the judgment.⁴ Where, however, findings are filed, but which do not include all the issues of fact involved in the case, no presumption of a waiver of findings can be indulged.⁵ And in such case the findings must support the judgment.⁶

CHAPTER IV.

TRIAL BY JURY.

§ 4659. **In General.**—Either party may bring the issue to trial or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require.⁷ Either party may demand a jury to try the issues, as the right of trial by jury shall be secured to all, and remain inviolate forever.⁸ The right to trial by jury is absolute, and can not be interfered with.⁹ Where the sheriff is a party to the action, the court may order the cause tried by a special jury to be summoned by the coroner; and there being no coroner, an elisor may be appointed for that purpose.¹⁰ The statute vests the ordering of a trial by jury in the discretion of the court.¹¹ In Oregon the court, having discharged the regular panel jurors in attendance, can not order another panel and compel the defendant to go to trial unwillingly.¹²

¹ Rice v. Inskeep, 34 Cal. 225.

² Sears v. Dixon, 33 Cal. 326; James v. Williams, 31 Id. 211.

³ Cal. Code C. P., sec. 634.

⁴ Mulcahy v. Glazier, 51 Cal. 626; Smith v. Lawrence, 53 Cal. 34.

⁵ People v. Forbes, 51 Cal. 628; Majors v. Cowell, Id. 478.

⁶ Bosquett v. Crane, 51 Cal. 505.

⁷ Cal. Code C. P., sec. 594.

⁸ Const. of Cal., art. 1, sec. 3.

⁹ Greason v. Keteltas, 17 N. Y. 491;

Sharp v. Mayor of N. Y., 18 How. Pr. 213; S. C., 9 Abb. Pr. 426; Lewis v. Varnum, 12 Id. 305. As to the propriety of a trial by jury where there is an issue of fraud, see Freeman v. Atlantic Mut. Ins. Co., 13 Id. 124.

¹⁰ Pacheco v. Hunsaker, 14 Cal. 120.

¹¹ Id.

¹² Mousseau v. Veeder, 2 Or. 113.

§ 4660. **Impaneling Jury.**—The action being called for trial, the jury will be drawn and impaneled in the manner prescribed by statute.¹ It shall consist of twelve persons, unless the parties consent to a less number; and such consent must be entered by the clerk in the minutes of the trial, and can not be inferred from the mere absence of the party.² In California three fourths of the jury are competent to render a verdict.³

Upon demand of either party for a jury trial, the court will order a venire to issue. The time provided by the statute in which the jury shall be returned by the sheriff is directory.⁴ If a party waits until the trial is entered upon before applying for a jury trial, it is a waiver of his right.⁵ The first act done by the clerk is to take the panel returned by the sheriff, so far as they have appeared, and not been excused by the court, and copy the names upon separate ballots, which he then puts in a box provided for that purpose. When a case is called for trial by jury, he is to draw twelve names from the box, and call them off as he draws them.⁶ The persons so drawn and called are to take their seats in the jury-box. If there are not twelve ballots in the box, the sheriff, under the direction of the court, is to summon from the body of the county, and not from by-standers, so many qualified persons as may be required to complete the jury.⁷ When the jury-box is full, and not before, counsel are to proceed to examine them touching their qualifications. Each party may examine the whole twelve before making any peremptory challenges, and if any are excused for cause, the deficiency must be supplied by calling other jurors, who may be examined in like manner until there are twelve who are adjudged by the court to be competent; and thereupon each party may challenge peremptorily, but he can not be required to do so before.⁸ The essential difference between the civil and criminal practice is that in the former none are to be sworn to try the case until the jury is complete, while in the latter those accepted may be sworn to try the case before the jury is finally completed.⁹ In Washington territory, in the drawing and formation of the jury, it is the practice to set aside the ballots with the names of those

¹ Cal. Code C. P., sec. 600; Laws of Oregon, sec. 178; Washington Territory, sec. 200; Idaho, sec. 159; Arizona, sec. 161.

² Gillespie v. Benson, 18 Cal. 410; United States v. Insurgents of Penn., 2 Dall. 335; Bonaparte v. Camden and Amboy R. R. Co., Baldw. 205; Cal. Code C. P., sec. 194.

³ Code C. P., sec. 613.

⁴ Mowry v. Starbuck, 4 Cal. 274; People v. Ferris, 1 Abb. Pr., N. S., 193.

⁵ McKeon v. See, 4 Robt. 449; Barlow v. Scott, 24 N. Y. 40.

⁶ Cal. Code C. P., sec. 600.

⁷ Id., sec. 227.

⁸ Taylor v. W. P. R. R. Co., 45 Cal. 330; People v. Scoggins, 37 Id. 680.

⁹ People v. Scoggins, *supra*.

drawn till they are discharged, when they are returned to the box.¹

§ 4661. **Qualifications of Jurors.**—No one shall be qualified to act as a juror unless he be: 1. A citizen of the United States, an elector of the county in which he is returned, whether his name be on the great register or not, and a resident of the township at least three months before being selected and returned.² Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicile, would not make a resident.³ A citizen of California, who has resided in the county fourteen days, and then been absent some months from the state, with the intention of returning to reside in the county, and has returned and resided in the county some fourteen days, is a competent juror.⁴ 2. In possession of his natural faculties.⁵ 3. One who has sufficient knowledge of the language in which the proceedings of the courts are had.⁶ 4. Assessed on the last assessment roll of his township or county, on real or personal property, or both, belonging to him.⁷ A person is not competent to act as a juror who does not possess the above qualifications, or who has been convicted of a felony or misdemeanor involving moral turpitude.⁸ The jury having been called are sworn to answer questions relative to their qualifications as jurors to hear the particular case then on trial. They are then questioned by counsel of either side as to their knowledge of the parties or the facts of the case, or as to whether they have formed or expressed an opinion of the merits of the cause, or upon any other question touching their fitness or fairness as jurors, not only to show that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge.⁹

§ 4662. **Objections to the Panel.**—Objections to the panel may be interposed for an irregularity in the formation of the jury, which goes to the merits of the trial or leads to the inference of improper influence upon their conduct.¹⁰ In Oregon, no challenge to the panel is allowed.¹¹ No objection being taken

¹ Code of Wash. Terr., sec. 205.

² Cal. Code C. P., sec. 198; see also Cal. Pol. Code, secs. 1083, 1084.

³ People v. Peralta, 4 Cal. 175; see Pol. Code, sec. 52.

⁴ People v. Stonecifer, 6 Cal. 405; Const. Cal., art. 11, sec. 19.

⁵ Cal. Code C. P., sec. 198.

⁶ Id.; see People v. Arceo, 32 Cal. 40.

⁷ Id.; People v. Thompson, 34 Cal.

671; Valton v. Nat. Loan Fund Ins. Co., 17 Abb. Pr. 268.

⁸ Cal. Code C. P., sec. 199. As to when persons shall be exempt from liability to serve as a juror, see Id., sec. 200.

⁹ Watson v. Whitney, 23 Cal. 376.

¹⁰ Thrall v. Smiley, 9 Cal. 529.

¹¹ Laws of Or., sec. 179.

to the manner of impaneling a jury, it is waived.¹ In Nevada, a challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or facts on which the challenge is based.² In New York, upon the challenge of the array, the practice is, that if the facts are denied, the court appoints triers, and if they pronounce the cause of challenge unfounded, the trial proceeds. If the facts are admitted, the court passes upon their sufficiency, and either quashes the array or overrules the challenge.³ No regular panel having been drawn and summoned, the court ordered thirty-six jurors to be summoned, twenty-seven of whom appearing, the court caused their names to be put in a box, from which twelve were drawn to constitute a trial panel: it was held not to be ground for challenge to the whole panel.⁴ But where the clerk drew seventy-two names out of the box, and selected thirty-six of them, it was a good ground of challenge to the array.⁵ That a jury has just tried a case involving the liability of defendant for a similar cause of action does not render it incompetent.⁶ So if the venire is executed and returned by any other person than the sheriff.⁷ So where the sheriff who served the venire was a party to the action.⁸ For default or partiality in the clerk, or if the clerk select the jury instead of drawing by lot.⁹ But an objection on the ground that the jury was summoned by order of the court, after the commencement of the term, is no ground of challenge to the panel.¹⁰ A jury drawn while the court was in session, in the presence of the court and its officers, must be held to have been drawn in open court, whether it was done in the room where the court usually sits or in another.¹¹ The object is to secure honest and intelligent men for the jury, and the order or time in which they are served is of no consequence.¹² A variance between the true name of a juror and that placed on the jury list is immaterial, if it satisfactorily appears that the person attending is the one really selected.¹³ Nor that the name of a juror was not on the venire return by the sheriff.¹⁴ In New York, it is no ground of challenge to the array that the clerk who drew the jury was at the time attorney in the cause.¹⁵

¹ *Dayharsh v. Enos*, 5 N. Y. 531; *Mayor of N. Y. v. Mason*, 1 Abb. Pr. 352; *Hardenburgh v. Crary*, 15 How. Pr. 307.

² *State v. Millain*, 3 Nev. 411.

³ *Gardner v. Turner*, 9 Johns. 260.

⁴ *People v. Stuart*, 4 Cal. 218.

⁵ *Gardner v. Turner*, 9 Johns. 260.

⁶ *Algiers v. Steamer Maria*, 14 Cal. 167.

⁷ *Cooper v. Bissell*, 16 Johns. 146.

⁸ *Woods v. Rowan*, 5 Johns. 133.

⁹ *Pringle v. Huse*, 1 Cow. 432; *Gardner v. Turner*, 9 Johns. 260.

¹⁰ *People v. Rodriguez*, 10 Cal. 59.

¹¹ *State v. Millain*, 3 Nev. 411.

¹² *Thrall v. Smiley*, 9 Cal. 529.

¹³ *State v. McNamara*, 3 Nev. 71.

¹⁴ *Thrall v. Smiley*, 9 Cal. 529.

¹⁵ *Wakeman v. Sprague*, 7 Cow. 720.

Nor that juries for two courts were drawn from the box at the same time, the two sets of names being kept distinct.¹

§ 4663. **Challenge to Juror.**—After questioning the jurors, counsel may challenge, either peremptorily or for cause. Each party shall be entitled to four peremptory challenges, and no reason need be given for the exercise of this right.² In Oregon and Washington territory only three peremptory challenges are allowed.³ Either party may exercise his right of peremptory challenge at any time after examination, but neither party can be required to exercise it prior to this stage of the proceedings.⁴ And when there are several parties on either side, they shall join in a challenge before it can be made.⁵ Where only one peremptory challenge is shown to have been used, it is presumed the other three were not used.⁶ If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.⁷ In California, a general challenge of a juror for cause, without specifying the particular grounds, is insufficient; it is not sufficient to say, "I challenge for cause," and then stop.⁸

§ 4664. **Grounds of Challenge.**—A challenge for cause, in California, may be made on one or more of the following grounds: 1. A want of any of the qualifications prescribed by the code to render a person competent as a juror;⁹ 2. Consanguinity, or affinity, within the fourth degree, to any party;¹⁰ the degree of kindred is established by the number of generations, and each generation is called a degree;¹¹ in the direct line there are as many degrees as there are generations;¹² in the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relation; in such computation the decedent is excluded, the relation included, and the ancestor counted but once; thus brothers are related in the second degree, uncle and nephew in the third degree, and cousins-german in the fourth, and so on.¹³ 3. Standing in the relation of guardian and ward,

¹ Crane v. Dygert, 4 Wend. 675.

² Cal. Code C. P., sec. 601; Laws of Idaho, sec. 161; Arizona, sec. 163.

³ Laws of Oregon, sec. 187.

⁴ People v. Scoggins, 37 Cal. 680; Taylor v. W. P. R. R. Co., 45 Id. 330.

⁵ Cal. Code C. P., sec. 601.

⁶ Fleeson v. Savage Silver Min. Co., 3 Nev. 157.

⁷ Cal. Code C. P., sec. 601. As to right of challenge and its exercise, see, generally, Walter v. People, 32 N. Y. 147.

⁸ Paige v. O'Neal, 12 Cal. 483.

⁹ Cal. Code C. P., sec. 602.

¹⁰ Id.

¹¹ Cal. Civ. Code, sec. 1389.

¹² Id., sec. 1392.

¹³ Id., sec. 1393. As to incompetency of jurors from relationship or interest, see Young v. Marine Ins. Co., 1 Cranch C. C. 452; Common Council of Alexandria v. Brockett, Id. 505; Orme v. Pratt, 4 Id. 124.

master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;¹ a tenant of either of the parties to the suit is incompetent.²

4. Former service as juror or witness on a previous trial, between the same parties, for the same cause of action. 5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation. Jurors must be wholly disinterested.³ 6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them. The former provision, as found in section 162 of the California practice act, has been materially changed by striking out the words "formed or expressed," and adding the words "founded upon knowledge of its material facts, or of some of them." Under the present California code, in order to disqualify, there must be a present unqualified opinion, founded upon knowledge of material facts. Simply "knowing and being aware of the circumstances connected with the affair" is not sufficient grounds.⁴ A juror having said that "if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right," it was held not sufficient ground for challenge.⁵ It is only an unqualified opinion in the mind of the juror that disqualifies.⁶ 7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party.⁷ Bias or prejudice of any kind is good ground for challenge under the seventh subdivision.⁸ Prejudice, being a state of mind more frequently founded in passion than in reason, may exist with or without a cause, and in the eye of the law has no degrees.⁹ Actual bias may be taken for the existence of such a state of mind that he can not try the issue impartially.¹⁰ To ask a person whether he is prejudiced or not against a party, and if so, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is

¹ Cal. Code C. P., sec. 602.

² Hathaway v. Helmer, 25 Barb. 29.

³ Wood v. Stoddard, 2 Johns. 194.

⁴ Lawrence v. Collier, 1 Cal. 38.

⁵ Durell v. Mosher, 8 Johns. 445.

⁶ State v. Millain, 3 Nev. 409; see People v. Symonds, 22 Cal. 348; People v. King, 27 Id. 512; People v. Murphy, 45 Id. 141; People v. Johnston, 46 Id. 78; People v. Weil, 40 Id. 268.

⁷ Cal. Code C. P., sec. 602, subd. 7; Laws of Idaho, sec. 162; Laws of Arizona, sec. 164.

⁸ People v. Reyes, 5 Cal. 347; Smith v. Floyd, 18 Barb. 522; Chouteau v. Pierre, 9 Mo. 3.

⁹ People v. Reyes, 5 Cal. 347.

¹⁰ Laws of Oregon, sec. 185; 3 Den. 124. Challenge, how taken; Laws of Oregon, secs. 188, 189.

the simplest method of ascertaining the state of his mind.¹ A mason or a royal arch mason is not disqualified from sitting on a jury where another mason of the same degree is a party.²

§ 4665. **Challenge, how Tried.**—Challenges for cause must be tried by the court, and witnesses may be examined. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.³ In New York, the challenge for favor or bias may be tried by the triers;⁴ but for having expressed an opinion upon the merits of the action, it must be tried by the court.⁵ When a judge, by consent of parties, acts as trier upon the challenge of a juror, his rejection of evidence is final, and can not be reviewed on appeal.⁶ The decision of the court is a decision as to fact, not law, and the supreme court would not, except in the clearest case, interfere with its decision.⁷ If a juror is challenged for cause, etc., that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise the inference that the challenging party is thereby injured.⁸ A party who accepts a juror, knowing him to be disqualified, waives the objection.⁹

§ 4666. **Jury Sworn.**—The challenges having been exhausted, or exercised to the satisfaction of the parties, the jury is sworn that they, each of them, will well and truly try the matter in issue between, the plaintiff, and, the defendant, and a true verdict render according to the evidence.¹⁰ Where, before the trial of an action of *assumpsit*, brought against three persons, two of the defendants confess judgment, but the damages have not been assessed, it is proper to swear the jury as to the remaining defendant.¹¹

§ 4667. **Evidence Adduced.**—The jury having been sworn to try the case, counsel for plaintiff states briefly the issue and his case, and then introduces his proofs, upon the close of which defendant states the nature of his defense, set-off, or counter-claim, as the case may be, and proceeds with his proofs. In all cases courts take judicial notice of certain facts. In California these are enumerated in the code of civil procedure, section

¹ People v. Reyes, 5 Cal. 347.

² Purple v. Horton, 13 Wend. 9.

³ Cal. Code C. P., sec. 603; Pringle v. Huse, 1 Cow. 432; Mechanics' and Farmers' Bank v. Smith, 19 Johns. 115.

⁴ Pringle v. Huse, 1 Cow. 432; Freeman v. People, 4 Den. 9; Smith v. Floyd, 18 Barb. 522.

⁵ Pringle v. Huse, 1 Cow. 432.

⁶ Costigan v. Cuyler, 21 N. Y. 134.

⁷ Trenor v. C. P. R. R. Co., 50 Cal. 230.

⁸ Fleeson v. Savage Silv. Min. Co., 3 Nev. 157.

⁹ People v. Stonecifer, 6 Cal. 411.

¹⁰ Cal. Code C. P., sec. 604.

¹¹ Noble v. Laley, 50 Pa. St. 281.

1875, and are the following: "1. The true signification of all English words and phrases, and of all legal expressions; 2. Whatever is established by law; 3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States; 4. The seals of all the courts of this state and of the United States; 5. The accession to office, and the official signatures and seals of office, of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States; 6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States; 7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public; 8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference." The court is to declare such knowledge to the jury, who are bound to accept it.¹

§ 4668. **Privileged Communications—Attorney and Client.**—Confidential communications made by a client to an attorney respecting the business he is employed to transact are privileged, and the attorney can not be compelled to disclose them; but the matter must be communicated to the attorney professionally and in the usual course of business. But statements made by the client to other persons at the time, or by other persons to him, are not privileged, and the attorney is bound to disclose them the same as any other witness.² If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not confidential.³ If, after final judgment, he makes disclosures respecting subjects of the foregone employment, the communications are not privileged.⁴ If the attorney receives a deed of the client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds.⁵ Where the attorney, when exam-

¹ Id., sec. 2102. For other matters prescribed or defined by the California code of civil procedure, consult the same, under the titles Evidence, Witnesses, Writings Public and Private, Estoppels, Presumptions, Rules of Examination, Effect of Evidence, Evidence in Particular Cases, etc.

² Gallagher v. Williamson, 23 Cal. 331; Cal. Code C. P., sec. 1181, subd. 2; Hager v. Shindler, 29 Cal. 72; see Story's Eq. Pl. 601; Gove v. Harris, 8 Eng. L. & Eq. 149.

³ Hager v. Shindler, 29 Cal. 48.

⁴ Id.

⁵ Id.

ined as a witness, was unable to state whether an accused person had made certain admissions to him, or whether they were disclosed while the accused was under examination as a witness in his own behalf, the court should have excluded the testimony of its own motion. The accused should have had the benefit of the doubt.¹ The privilege applies to the communication, and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or from his legal adviser; and this privilege is not affected by the statutes making parties witnesses.² A party having given evidence in chief on his own behalf can not, on cross-examination, be compelled to divulge statements made by him when consulting as a client an attorney at law, such communication being privileged as well when the client is a witness as when the attorney is a witness.³ Where the accused in a criminal trial becomes a witness in his own behalf, he can not be compelled on cross-examination to disclose confidential communications between himself and his attorneys.⁴

§ 4669. **Husband and Wife.**—A husband can not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.⁵

§ 4670. **Physician.**—A licensed physician or surgeon can not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.⁶

§ 4671. **Priest.**—A clergyman or priest can not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.⁷

¹ *People v. Atkinson*, 40 Id. 285.

² *Montgomery v. Pickering*, 116 Mass. 227; *Brand v. Brand*, 39 How. Pr. 193; *Barker v. Kuhn*, 38 Iowa, 395.

³ *Bigler v. Ryker*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *Bobo v. Bryson*, 21 Ark. 287. To the

contrary is *Inhabitants of Woburn v. Henshaw*, 101 Mass. 200.

⁴ *Duttenhofer v. State*, 34 Ohio St. 91.

⁵ Cal. Code C. P., sec. 1881, subd. 1.

⁶ Cal. Code C. P., sec. 1881, subd. 4.

⁷ Cal. Code C. P., sec. 1881, subd. 3.

§ 4672. **Public Officer.**—A public officer can not be examined as a witness as to communications made to him in official confidence, when the public interests would suffer by the disclosure.¹ But a judge or any juror may be a witness.²

§ 4673. **Witnesses in General.**—Where the answer of a witness would tend to subject him to punishment for a felony, he is privileged from answering, on the ground solely that he is not compelled to criminate himself.³ The only case where a witness is privileged, on the ground that his answer would disgrace him, is when it is not pertinent to the issue.⁴

§ 4674. **Who may be Witnesses.**—In California, and generally throughout the United States, all persons, with few exceptions, who having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question.⁵ The following persons can not be witnesses: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 3. Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of the deceased.⁶

§ 4675. **Children.**—There is no precise age within which children are excluded from giving testimony. Their competency is to be determined by the court, not by their age, but by the degree of their understanding and knowledge.⁷ And if over ten years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and its presence, before they can be sworn.⁸ Where a witness, being sworn, stated that he was fourteen years old and a Chileno, and did not know “the obligation of an oath,” whereupon the judge explained to him the nature of such obligation, and he was then

¹ Cal. Code C. P., sec. 1881, subd. 5.

² Id., sec. 1883.

³ Ex parte Rowe, 7 Cal. 184.

⁴ Id. See Cal. Code C. P., sec. 2065.

⁵ Cal. Code C. P., sec. 1879.

⁶ Id., sec. 1880.

⁷ People v. Bernal, 10 Cal. 66.

⁸ Id.

permitted to testify, the other party objecting that he did not know the obligation of an oath, it was held that the witness was competent.¹ But a deaf and dumb child, about nine years of age, who has no idea of an oath, and who can not be made to understand questions asked him, is not competent.²

§ 4676. **Parties to Suits.**—The provision of the California code of civil procedure, section 1880, subdivision 3, applies not only to parties who have, or are supposed to have, an interest adverse to the estate of the defendant, but by its terms renders all the nominal parties to the action incompetent.³ In an action against an executor upon a claim against his testator, the deposition of the plaintiff can not be received in evidence since the amendment to the code of civil procedure, which took effect July 1, 1874, even if the deposition was taken before said amendment was passed.⁴ But the executor or administrator is not prohibited from calling a party to the action to testify in behalf of the estate.⁵

§ 4677. **Partner Surviving.**—In Nevada, when a surviving partner is sued for a loan for the use of the firm, made to a deceased partner, and of the particulars of which the deceased partner only was cognizant, the plaintiff is not a competent witness in his own behalf.⁶

§ 4678. **Religious Belief.**—Under the California constitution, a witness is competent, without respect to his religious belief, or independent thereof.⁷

§ 4679. **Practice on Evidence—Contradictory Statements.**—Where a witness is subject to be impeached by proof of contradictory statements, the precise matter of these contradictions, and the time and place of the statements, must be brought to the knowledge of the witness on cross-examination.⁸ This rule applies equally to evidence of declaration or acts of hostility or of ill feeling on the part of the witness.⁹ It is in the discretion of the court to admit such impeaching evidence, and the party offering such evidence must show error to his prejudice, by putting his exceptions to the ruling of the court in proper shape.¹⁰ If the deposition of a witness has been introduced on behalf of one party, the other may prove his confessions or declarations for the purpose of contradicting his dep-

¹ Fuller v. Fuller, 17 Cal. 605.

² Territory v. Duran, 1 West Coast Rep. 274.

³ Blood v. Fairbanks, 50 Cal. 421.

⁴ Mitchell v. Haggmeyer, 51 Cal. 108.

⁵ Chase v. Evoy, 51 Cal. 618.

⁶ Roney v. Buckland, 4 Nev. 45.

⁷ Fuller v. Fuller, 17 Cal. 605.

⁸ Baker v. Joseph, 16 Cal. 173.

⁹ Id.

¹⁰ Id.; see McDaniel v. Baca, 2 Cal. 327.

osition or impeaching his credit.¹ The party calling a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony.²

§ 4680. **Cross-examination.**—Courts are apt to make too narrow a view of the rights of cross-examination, confining it to the subject-matter of the examination in chief. Undoubtedly the cross-examination can not go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact touching the matters to which he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject-matter, may be fully tested.³ The opposite party may cross-examine a witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.⁴

§ 4681. **Discretion of Court.**—It is in the discretion of the court to allow or refuse the introduction of further testimony after resting;⁵ or to allow a leading question to be put;⁶ or to grant an amendment at the trial.⁷ The refusal of a court trying an issue without a jury to consider the testimony as conflicting, or to pass upon the credibility of witnesses, raises no questions reviewable.⁸

§ 4682. **Documentary Evidence.**—The exemplification of a decree of divorce must contain all the proceedings, and must show on its face that jurisdiction was acquired;⁹ of a record of a will must contain the proofs before the surrogate.¹⁰ The attestation of a foreign judgment must be signed by the clerk

¹ Fox v. Fox, 25 Cal. 587.

² Cal. Code C. P., secs. 2049, 2052; see also Patterson v. Keystone M. Co., 30 Cal. 360; Norwood v. Kenfield, Id. 398; People v. Chin Mook Sow, 51 Id. 597.

³ Jackson v. Feather River and Gibsonville Water Co., 14 Cal. 18.

⁴ Cal. Code C. P., sec. 2048; see also Harston's Practice, note to same section; People v. Chin Mook Sow, 51 Cal. 597.

⁵ Meyer v. Goedel, 31 How. Pr. 456.

⁶ Black v. Camden and Amboy R. Co., 45 Barb. 40.

⁷ Binnard v. Spring, 42 Barb. 470. As to the order of admission of relevant testimony, see Murphy v. Boker, 28 How. Pr. 251. As to imposing restrictions on undue latitude of cross-examination, see Great West Turnpike Co. v. Loomis, 32 N. Y. 127.

⁸ Terry v. Wheeler, 25 N. Y. 520.

⁹ Lawrence's Case, 18 Abb. Pr. 347.

¹⁰ Hill v. Crockford, 24 N. Y. 128.

himself.¹ A certificate of exemplification of a judgment rendered in another state, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies to that attestation as in due form of law, is sufficient, under the act of congress of May 26, 1790, to sustain an action upon the judgment in another state.²

§ 4683. **Impeachment of Witness.**—A witness may be impeached by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, and integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony. But conviction of a felony must be proved by the record; parol evidence of the fact is inadmissible.³ A witness who is called to impeach another may answer that he would not believe such other witness on oath. This is the uniform practice in California.⁴ Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness. It must be restricted to her character for truth and veracity.⁵

§ 4684. **Party not Bound by Statements.**—A party is not bound by, or held to admit as true, statements made by his witnesses during the trial, because he does not deny or contradict them at the time.⁶ If a party offers a witness to prove the sale of a mining claim, under which he claims, and the witness says the sale was in writing, the party is bound by the statement of the witness, and must produce the writing or account for its loss.⁷ A party calling a witness is not precluded from proving by another witness, the truth of any particular fact in direct contradiction to what the first witness may have testified.⁸

§ 4685. **Recalling Witness.**—If the ends of justice require,

¹ *Morris v. Patchin*, 24 N. Y. 394. As to authentication of a Canada judgment, see *Lazier v. Westcott*, 26 N. Y. 146. Of a judgment of English privy council, see *Jarvis v. Sewall*, 40 Barb. 449. See as to admission of foreign charter *per se*, *Brooks Paper Works v. Willett*, 19 Abb. Pr. 416.

² *Thompson v. Manrow*, 1 Cal. 428; *Parke v. Williams*, 7 Id. 249. Consult, also, Cal. Code C. P., secs. 1887 to 1951.

³ *People v. Schenick*, 4 West Coast Rep. 77; Cal. Code C. P., sec. 2051; see Id., sec. 2052; *People v. Reinhart*, 39 Cal. 449; *Newcomb v. Griswold*, 24 N. Y. 298; *People v. Murray*, 41

Cal. 67; *People v. Ah Who*, 49 Id. 32; *People v. Parton*, Id. 632.

⁴ *Stevens v. Irwin*, 12 Cal. 306; see also *People v. Tyler*, 35 Id. 553.

⁵ *People v. Yalas*, 27 Cal. 630. *Curry, J.*, holds that it should not be confined to her character for truth and veracity, but should extend to her entire moral character; and she may be impeached by testimony showing that her general moral character is bad: Id.

⁶ *Wilkins v. Stidger*, 22 Cal. 231.

⁷ *Patterson v. Keystone Mining Co.*, 30 Cal. 360.

⁸ *Norwood v. Kenfield*, 30 Cal. 393.

it is both the right and duty of a court to permit a witness to be recalled after a party has closed his case.¹

§ 4686. **Argument of Counsel.** Upon the close of the evidence, counsel for plaintiff opens the argument to the jury. Defendant replies, and plaintiff's counsel closes. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.² The court may then charge the jury.³ The party who holds the affirmative and calls the first witness to make the closing address has the right.⁴ On argument on demurrer to one separate defense, another can not be referred to to sustain it.⁵ The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the court or referee, on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact, and the trial is not completed until the cause is finally submitted to the court, referee, or jury.⁶

§ 4687. **Instructions to Jury.**—In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must inform the jury that they are exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.⁷ The instruction by the court should be a complete charge upon the legal questions to which it relates.⁸ If the court charge the jury erroneously upon a proposition of law, which does not arise in the case, either upon the pleadings or the evidence, and which could not affect the result, the error is not material, and will not cause a reversal of the judgment.⁹

A judge is bound to instruct a jury upon each proposition of law submitted to him by counsel bearing upon the evidence.¹⁰ But he is not bound, without the request of parties, to instruct the jury; and the latter are presumed to be acquainted with all

¹ Fairchild v. Cal. Stage Co., 13 Cal. 599; People v. Keith, 50 Id. 139; Cal. Code C. P., sec. 2050.

² Cal. Code C. P., sec. 607, subd. 5.

³ Id., subd. 6.

⁴ Elwell v. Chamberlin, 31 N. Y. 611. As to allowing the right to close to either party, see Fry v. Bennett, 28 N. Y. 324.

⁵ Jackson v. Van Slyke, 44 Barb. 116.

⁶ Mygatt v. Wilcox, 35 How. Pr. 410.

⁷ Cal. Code C. P., sec. 608.

⁸ Bradley v. Lee, 38 Cal. 362.

⁹ Satterlee v. Bliss, 36 Cal. 489.

For instructions which are to be given on all proper occasions, see Cal. Code C. P., sec. 2061.

¹⁰ Zabriskie v. Smith, 13 N. Y. 322.

the rules of law in regard to which the parties do not require them to be instructed, or the court does not instruct them.¹ Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.² If either party deem any instruction appropriate, he must offer it.³ Proposed instructions should be read in the hearing of the jury before they are passed upon by the court.⁴ Upon refusal to give instructions, the court should state its reasons, or it is error.⁵ Whenever the knowledge of the court is by this code made evidence of a fact the court is to declare such knowledge to the jury, who are bound to accept it.⁶ If an equity case is treated as an ordinary action at law, and submitted to a jury as such, and the court considered itself bound and controlled by the verdict as in an action of law, each party has the same right with respect to instruction as if it were a case at law.⁷ The court should give or refuse instructions as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered.⁸ But where an instruction asked by defendant, if given entire, would have been erroneous, the court is not bound to separate the concluding clause, and give that by itself, and may therefore refuse to give the instruction.⁹ A correct charge by the court upon a matter in issue cures a refusal by the court to give a correct charge upon the same point asked by one of the other parties.¹⁰ A rule of court requiring counsel to file and submit to the court any instructions they may offer, before the argument is closed to the jury, does not operate where the cause is submitted without argument.¹¹ If there is a rule requiring instructions to be handed to the judge by a certain time in the progress of the trial, if it is not error for the court to refuse instructions not handed in in time.¹²

¹ Haupt v. Pohlman, 16 Abb. Pr. 301; Marine Bank of N. Y. v. Clements, 31 N. Y. 33; Wilklow v. Lane, 37 Barb. 244.

² Cal. Code C. P., sec. 609.

³ People v. Ah Wee, 48 Cal. 239.

⁴ Waldie v. Doll, 29 Cal. 561.

⁵ People v. Hurley, 8 Cal. 391; People v. Ramirez, 13 Id. 173; People v. Williams, 17 Id. 148.

⁶ Cal. Code C. P., sec. 2102.

⁷ Van Vleet v. Olin, 4 Nev. 95.

⁸ Conrad v. Lindley, 2 Cal. 174;

Jamson v. Quivey, 5 Id. 491; Russell v. Amador, 3 Id. 403; People v. Davis, 47 Id. 93; First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co., 23 How. Pr. 448.

⁹ Smith v. Richmond, 19 Cal. 477; Mayor of N. Y. v. Exchange Fire Ins. Co., 9 Bosw. 424; People v. Davis, 1 West Coast Rep. 341; People v. Bidlecome, Id. 691.

¹⁰ Davis v. Perley, 30 Cal. 630.

¹¹ Tinney v. Endicott, 5 Cal. 102,

¹² Waldie v. Doll, 29 Cal. 556,

§ 4688. **Instructions, how Given.**—Instructions in civil and criminal cases should be drawn with reference to the case, as made by the evidence.¹ An instruction of the court to the jury must be adapted to the facts of the case.² Instructions to a jury, asked by a party, which are not pertinent to any issue in the cause, should be refused, even though they embody correct abstract principles of law.³ No instructions should be given to a jury which are not predicated upon some theory logically deducible from at least some portion of the testimony.⁴ Where the answer was insufficient as a denial of the allegations in the complaint, and the court instructed the jury to find for plaintiff, it was held that the instruction was right, no evidence being required on the part of plaintiff.⁵ When certain allegations of fact in the complaint are admitted in the answer, an instruction by the court to the jury that the admitted facts will be taken by them as true, and that they will so find for plaintiff, is not an instruction to the jury to find a verdict in favor of the plaintiff, except as to the facts so admitted.⁶ It is not error for the judge, in stating the testimony of the jury, to read a memorandum of testimony taken by another person, instead of using his own minutes or making the statement from recollection.⁷ In stating the testimony, the safer course is to recite the language of the witness, but if the substance only is stated correctly, it is not error.⁸ Whether an instruction giving the general rule without qualification be proper or not depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case.⁹

§ 4689. **Instructions Refused.**—Instructions are properly refused when not warranted by the pleadings.¹⁰ If facts are admitted in the pleadings, the jury should be so instructed.¹¹ To instruct the jury upon mere abstract questions of law, irrelevant to the case, serves only to bewilder and mislead them from the true issue to be determined.¹² Where a party asks an abstract proposition of law, by way of instruction to a jury, he

¹ *People v. Roberts*, 6 Cal. 217.

² *People v. Honshell*, 10 Cal. 87; *People v. Byrnes*, 30 Id. 206; *Thompson v. Lee*, 8 Id. 275; *People v. Hurley*, 30 Id. 390.

³ *Conlin v. S. F. & S. J. R. R. Co.*, 36 Cal. 404; *People v. Byrnes*, 30 Id. 206; *Capuro v. Builders Ins. Co.*, 39 Id. 123; *People v. Turley*, 50 Id. 469.

⁴ *People v. Sanchez*, 24 Cal. 28.

⁵ *Kuhland v. Sedgwick*, 17 Cal. 123.

⁶ *Blood v. Light*, 31 Cal. 115.

⁷ *People v. Boggs*, 20 Cal. 432.

⁸ *People v. Doyell*, 48 Cal. 91; see also, on this subject, *People v. Dick*, 34 Id. 663; *Pico v. Stevens*, 18 Id. 377.

⁹ *People v. Arnold*, 15 Cal. 482.

¹⁰ *Thompson v. Lee*, 8 Cal. 276.

¹¹ *Tevis v. Hicks*, 41 Cal. 123.

¹² *Gowler v. Smith*, 2 Cal. 39; *Benham v. Schaeffer*, Id. 387; *Branger v. Chevalier*, 9 Id. 353; *Fairchild v. Cal. Stage Co.*, 13 Id. 599.

takes the risk of its being correct in all its parts.¹ And a court may refuse an instruction asked, when the same has already been given in substance.² If the court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point.³ Where equivalent instructions are asked and refused, the court should place its refusal on the ground that equivalent instructions were given. Unless this is done, the jury may be misled.⁴ A court may refuse to give to the jury an instruction which embraces a question which came properly before the court, and not before the jury.⁵ It is not error for the court to refuse to instruct a jury "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose."⁶ The court can not be called upon to charge upon an assumed state of facts not proved upon the trial.⁷ The court has no right to charge the jury in regard to conclusions of facts,⁸ as it is the province of the jury, unaided by the court, to say whether a fact is proved or otherwise.⁹ It is not error for the court to refuse to instruct the jury upon a point in relation to which there is no evidence.¹⁰ Or where there is only such slight evidence as is plainly insufficient to establish it, it is proper for the court to instruct the jury to that effect, and withdraw the point from their consideration.¹¹ Or which assumes a certain fact to exist, respecting which evidence has been introduced before the jury.¹²

How far it is necessary and proper for the judge to refer to and comment upon the evidence in the charge is a question of discretion.¹³ It is not error for the judge to intimate an opinion on a question of fact, if the determination of the question is left by him to the jury.¹⁴ The judge is not at liberty to state his opinion on any question, on the supposition that it is a question of law, and afterwards to submit it to the jury as a question of fact. If it is a matter of fact in dispute, he has no right to state his conclusions thereon; if it is a matter of law, he has no right

¹ Thompson v. Paige, 16 Cal. 77.

² People v. King, 27 Cal. 509; Fairchild v. Cal. Stage Co., 13 Id. 599; Belden v. Henriques, 8 Id. 87.

³ People v. Williams, 32 Cal. 280; People v. Lee Hung, 1 West Coast Rep. 45; Martin v. Hill, Id. 629; Territory v. Kinney, Id. 801; Seattle v. Busby, 2 Id. 45.

⁴ People v. Hurley, 8 Cal. 390; People v. Ramirez, 13 Id. 152.

⁵ Branger v. Chevalier, 9 Cal. 353.

⁶ Davis v. Davis, 26 Cal. 44.

⁷ Crawford v. Roberts, 50 Cal. 236; Sperry v. Spaulding, 45 Id. 544; Pratt v. Ogden, 34 N. Y. 22; Hope v. Lawrence, 50 Barb. 258.

⁸ Treadwell v. Wells, 4 Cal. 260.

⁹ People v. Dick, 32 Cal. 213.

¹⁰ Crawford v. Roberts, 50 Cal. 236; People v. Hurley, 8 Id. 390.

¹¹ Selden v. Cashman, 20 Cal. 56.

¹² Preston v. Keys, 23 Cal. 193.

¹³ Poler v. N. Y. C. R. R., 16 N. Y. 480.

¹⁴ Althrop v. Wolf, 2 Hilt. 344.

to leave it to the jury.¹ The constitutional right of the court "to state the testimony" to the jury would hardly authorize a judge to express his opinion as to its effect.² A charge to the jury, telling them that, in determining a particular issue material to the case, the court thought they "could have no hesitation whatever," taken in connection with the rest of the charge, was an intimation that the evidence sufficiently established the fact in question, and was erroneous.³ But where no other conclusion can be arrived at from the evidence, the error will not justify a reversal.⁴ Where the charge of the court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism.⁵ In New York, if a request involve several propositions, error in any justifies its refusal. The attention of the court should be drawn to each and every specific ruling.⁶ And the proposition submitted must be good in all its parts, or refusal will not be error.⁷ The same rule is laid down as to the offer of evidence.⁸ When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.⁹

§ 4690. **Conduct of the Jury.**—After hearing the charge, the jury may either decide in court or retire for deliberation.¹⁰ Should they retire for deliberation, the officer of the court, having first been sworn not to communicate nor allow others to communicate with them, conducts them to the jury-room, where they deliberate upon and make up their verdict. They may

¹ *Vedder v. Fellows*, 20 N. Y. 126.

² *Seligman v. Kalkman*, 8 Cal. 216.

³ *People v. Dick*, 34 Cal. 663.

⁴ *Pico v. Stevens*, 18 Cal. 377.

⁵ *Brooks v. Crosby*, 22 Cal. 43.

⁶ *Magee v. Badger*, 34 N. Y. 247.

⁷ *Wright v. Paige*, 36 Barb. 438, 443; see *Doughty v. Hope*, 3 Denio, 594; S. C., 1 N. Y. 79; *Zabriskie v. Smith*, 13 Id. 332; *Cronk v. Canfield*, 31 Barb. 171; *Magee v. Badger*, 30 Id. 246; *Griggs v. Howe*, 2 Keyes, 581; *Jones v. Osgood*, 6 N. Y. 233.

⁸ *Hosley v. Black*, 28 N. Y. 438;

26 How. Pr. 97. For the practice in New York, consult further *Taylor v. Atlantic M. Ins. Co.*, 9 Bosw. 369; *Gurney v. Smithson*, 7 Id. 396; *McIntyre v. Clapp*, 31 N. Y. 569; *Magee v. Badger*, 34 Id. 247, 393; *Patchin v. Peck*, 38 Id. 39; *Hoxie v. Allen*, Id. 179; *Fountain v. Pettee*, Id. 184; *Meyer v. Fiegel*, 34 How. Pr. 434; *Mallory v. Tioga R. R. Co.*, 5 Abb. Pr., N. S., 420; *Bunnell v. Greathead*, 49 Barb. 106.

⁹ Cal. Code C. P., sec. 610.

¹⁰ Cal. Code C. P., sec. 613.

take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings of the trial taken by themselves, or any of them, but none taken by any other persons.¹ They may come into court for information upon the testimony, in case of a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause. Upon their being brought into court, the information required must be given in the presence of or after notice to the parties or counsel.² If the court reads to the jury all the instructions for which they ask, it is sufficient. All the instructions need not be read again.³ The judge may keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree.⁴ But he has no right to threaten or intimidate them in order to affect their deliberations.⁵ A new trial will not be granted because the judge tells them, through the sheriff, that if they do not agree in five minutes they must remain in the jury-room all night.⁶ It is the province of the jury to determine from the evidence the issues of fact, and their decision is final.⁷ Having determined upon their verdict, they are brought into court by the officer, and through their foreman they declare the same. If it be a sealed verdict, it is read by the clerk, so that parties may be distinctly informed of its purport.⁸

If after the impaneling a jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled.⁹ In all cases where the jury are discharged or prevented from giving a verdict by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.¹⁰ The court may receive a verdict or discharge a jury on Sunday or a holiday, and on such day may adjudicate the fact that the

¹ Cal. Code C. P., sec. 612; *Howland v. Willetts*, 9 N. Y. 170; *Porter v. Mount*, 45 Barb. 422.

² Cal. Code C. P., sec. 614.

³ *Russell v. Dennison*, 45 Cal. 338.

⁴ *Green v. Telfair*, 11 How. Pr. 260.

⁵ *Green v. Telfair*, 11 How. Pr. 260.

⁶ *People v. Hughes*, 29 Cal. 258.

⁷ *McCauley v. Weller*, 12 Cal. 500.

⁸ *Blum v. Pato*, 20 Cal. 70.

⁹ Cal. Code C. P., sec. 615.

¹⁰ *Id.*, sec. 616.

jury can not agree.¹ The court must adjudicate this fact upon some kind of evidence, such as their being called into court and pronouncing their inability to agree in presence of the court and parties.² A final adjournment of the court for the term discharges the jury.³ While the jury are absent the court may adjourn from time to time in respect to other business, but it is nevertheless open for any purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged.⁴ The court may direct the jury to bring in a sealed verdict.⁵

§ 4691. **Amendment of Verdict.**—The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the case, where the amendment in no respect changes the rights of the parties.⁶ The right to correct does not depend upon the judgment, and the steps necessary for that purpose must be taken in the statutory time.⁷ When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected under the advice of the court, or the jury may be again sent out.⁸ But error in substance can not be corrected by motion.⁹ If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error.¹⁰

§ 4692. **Chance Verdict.**—A verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside;¹¹ such verdicts being regarded in the same light as gambling verdicts.¹² When jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the whole amount of those sums by the number of persons composing the jury, which result shall be their verdict, a verdict thus found is irregular, and will be set aside.¹³ But if such means be adopted without any being bound thereby, and afterwards the jury agree upon such sum, the court will not disturb the verdict.¹⁴ Such verdict is not a chance verdict within the meaning of subdivision 2 of section 193 of the California prac-

¹ People v. Lightner, 49 Cal. 228.

² People v. Cage, 48 Cal. 326.

³ Cal. Code C. P., sec. 617; see People v. Cage, 48 Cal. 326; Himmelmann v. Fitzpatrick, 50 Id. 649.

⁴ Cal. Code C. P., sec. 617.

⁵ Id.; see Paige v. O'Neal, 12 Cal. 488.

⁶ Perkins v. Wilson, 3 Cal. 139; see Truebody v. Jacobson, 2 Id. 269.

⁷ Allen v. Hill, 16 Cal. 113.

⁸ Cal. Code C. P., sec. 619; see, as to the power of correcting mere technical errors, Wells v. Cox, 1 Daly, 515.

⁹ Brush v. Kohn, 9 Bosw. 589.

¹⁰ Ross v. Austill, 2 Cal. 183.

¹¹ See Cal. Code C. P., sec. 657, sub. 2; Donner v. Palmer, 23 Cal. 40.

¹² Wilson v. Berryman, 5 Cal. 44.

¹³ Wilson v. Berryman, 5 Cal. 45.

¹⁴ Id.

tice act;¹ but is vicious, and should be set aside if the facts were proved by competent testimony.²

§ 4693. **Character and Form of Verdict.**—When the party does not rely in his pleadings upon an estoppel, but himself opens the truth or falsehood of the facts which he claims that the other party is estopped to aver or deny, and makes the truth of these facts the very issue which the jury are called upon to try, the jury are bound to find according to the real truth of the facts proved before them.³ The terms and expressions in the pleading will not necessarily give character to or determine the effect or meaning of the verdict.⁴ A recovery, if had, must be grounded upon the facts which are averred in the complaint, and not upon those which are denied.⁵ The verdict must be confined to the matters put in issue by the pleadings.⁶ A verdict need not be entitled at all.⁷ The verdict of a jury in a chancery case is only advisory to the chancellor or this court,⁸ and may be disregarded.⁹

§ 4694. **Claim and Delivery, Form of Verdict in Actions for.**—In actions for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.¹⁰ Where there has been a nonsuit in the original action, these questions are open on the trial of an action on the replevin bond.¹¹

§ 4695. **Conclusiveness of Verdict.**—The finding of a jury, or of the court below acting as a jury, upon a question of fact is final and conclusive.¹² A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same

¹ Code C. P., sec. 657; *Boyce v. Cal. Stage Co.*, 25 Cal. 460.

² *Turner v. Tuolumne Co. Wat. Co.*, 25 Cal. 397.

³ *Anthony v. Brayton*, 7 R. I. 52; see Cal. Code C. P., secs., 1908, 1962.

⁴ *McLaughlin v. Kelly*, 22 Cal. 212.

⁵ *Gregory v. Haworth*, 25 Cal. 653.

⁶ *Benedict v. Bray*, 2 Cal. 251; *Truebody v. Jacobson*, Id. 285.

⁷ *McGarrity v. Byington*, 12 Cal. 426.

⁸ *Still v. Saunders*, 8 Cal. 281.

⁹ *Goode v. Smith*, 13 Cal. 84; *Wingate v. Ferris*, 50 Id. 105; *Johnson v. Powers*, 2 West Coast Rep. 740; *Sweetzer v. Dobbins*, 3 Id. 616.

¹⁰ Cal. Code C. P., sec. 627. This section does not apply to a nonsuit.

¹¹ *Ginica v. Atwood*, 8 Cal. 446.

¹² *Perry v. Cochran*, 1 Cal. 180; *Duff v. Fisher*, 15 Id. 380.

fact or title;¹ but the fact or title must be material or relevant;² and the court will intend that the verdict settles every question of fact litigated upon the trial.³ A general rule has been maintained that the verdict of a jury is conclusive upon the question of fact submitted to them, if there be any evidence to support it.⁴ A verdict is never conclusive upon immaterial or collateral issues.⁵ Where there is such overwhelming evidence against the verdict as to justify the conclusion that it was rendered under the influence of passion, or prejudice, or bias of some kind, a new trial should be granted, even though there be some conflict.⁶

§ 4696. **Directing Verdict.**—The practice act confers express authority upon the courts below to direct a special verdict;⁷ and the court must determine what particular facts the jury shall find specially, and neither party has the right to dictate terms.⁸ And where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings, and should be separately and distinctly stated.⁹ In all cases the court may instruct the jury, if they render a general verdict, to find upon particular questions of facts, to be stated in writing.¹⁰ Where there is no dispute as to facts, and the law upon these facts declares a transaction fraudulent, it is not a question for the jury. The court in such case may direct the jury how to find or set aside the verdict, if they find to the contrary.¹¹

§ 4697. **Entry of Verdict.**—Upon receiving a verdict an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where special verdict is found, either the judgment rendered thereon or the

¹ Kidd v. Laird, 15 Cal. 161.

² See, as to presumption in favor of correctness of verdict, not clearly designating its precise import, Carpenter v. Simmons, 28 How. Pr. 12.

³ Wolf v. Goodhue Fire Ins. Co., 43 Barb. 400.

⁴ Noonan v. Hood, 49 Cal. 294; Trenor v. C. P. R. R. Co., 50 Id. 222; Miller v. Lockwood, 32 N. Y. 203; Hyatt v. Trustees of Rondout, 44 Barb. 385; Fleming v. Smith, Id. 554; Kavanaugh v. Beckwith, Id. 192; People v. Townsend, 37 Id. 520; Cothran v. Collins, 29 How. Pr. 155; Decker v. Myers, 31 Id. 372; Lewis v. Blake, 10 Bosw. 198.

⁵ Bear River and Auburn Water and Mining Co., 15 Cal. 145. See

qualification of rule as regards verdict manifestly against evidence: Suydam v. Grand Street and Newtown R. R. Co., 41 Barb. 375; S. C., 17 Abb. Pr. 304; Greer v. Mayor of New York, 1 Abb. Pr., N. S., 206.

⁶ Dickey v. Davis, 39 Cal. 569; Mason v. Austin, 46 Id. 387; Sherman v. Mitchell, Id. 579; see, generally, "New Trials" and "Appeals," *post*.

⁷ Burritt v. Gibson, 3 Cal. 396.

⁸ American Co. v. Bradford, 27 Cal. 360.

⁹ Phoenix Water Co. v. Fletcher, 23 Cal. 482.

¹⁰ Cal. Code C. P., sec. 625.

¹¹ Chenery v. Palmer, 6 Cal. 119.

order reserving it for argument or further consideration.¹ That will be treated as the verdict which the jury actually bring in, and the court should direct it to be recorded as rendered.²

§ 4698. **Errors Cured.**—A defective allegation of a fact may be cured by verdict, but not the absence of an allegation.³ The failure to aver performance is cured by verdict.⁴ So in a verified complaint where a special demand is essential, the error of a general averment of demand is cured by verdict.⁵ After verdict, defects in substance in the declaration are cured if the issue joined be such as necessarily required on the trial proof of the facts defectively or imperfectly stated or omitted; and the court will presume that the facts showing the right were proved.⁶ Where the complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by verdict.⁷

§ 4699. **General Verdict.**—A general verdict is that by which a jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant.⁸ In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict.⁹ A general verdict will include all parties who do not answer separately or demand separate verdicts.¹⁰ Its effect will be limited to such issues as necessarily controlled the action of the jury.¹¹ In an action to recover the possession of land, the following verdict: "We, the jury in this cause, find a verdict in favor of the plaintiff against the defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages," was held substantially a general verdict.¹² A general verdict entered on counts of which part are bad is erroneous. But if the good counts set forth a sufficient cause of action it may stand.¹³

§ 4700. **How Authenticated.**—The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk.¹⁴

¹ Cal. Code C. P., sec. 628.

² *Moody v. McDonald*, 4 Cal. 297.

³ *Hentsch v. Porter*, 10 Cal. 555.

⁴ *Happe v. Stout*, 2 Cal. 460.

⁵ *Mills v. Barney*, 22 Cal. 240; *Jones v. Block*, 30 Id. 227.

⁶ *Stanley v. Whipple*, 2 McLean, 35; see *Garland v. Davis*, 4 How. U. S. 131, 145; *Brent, Ex'rs of, v. Bank of the Metropolis*, 1 Pet. 89.

⁷ *People v. Rains*, 23 Cal. 127; see *Garner v. Marshall*, 9 Id. 263.

⁸ Cal. Code C. P., sec. 624.

⁹ Id., sec. 625.

¹⁰ *Winans v. Christy*, 4 Cal. 70; *Ellis v. Jeans*, 7 Id. 409.

¹¹ Id.; *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

¹² *Hutton v. Reed*, 25 Cal. 478; see *Leese v. Clark*, 28 Id. 26.

¹³ *Fry v. Bennett*, 28 N. Y. 324.

¹⁴ *Reynolds v. Harris*, 8 Cal. 618.

§ 4701. **Informal Verdict.**—Where the declaration in an action of *assumpsit* contained the following counts: 1. On a promissory note; 2. *Indebitatus assumpsit* for the hire of chattels; 3. An account stated; 4. *Quantum valebat* for the service of chattels; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of chattels; and the defendant pleaded: 1. The general issue; 2. Statute of limitations; 3. Payment; and the jury found a verdict for “the defendant upon the issue joined, as to the within note of four hundred and fifty-six dollars, and the within account:” this verdict, although informal, was sufficient authority to enter a general judgment for defendant.¹ When the verdict returned by the jury is informal, it is the duty of the court to explain to them its defects, and direct them to put it in proper form.² The only object of a verdict is to express in intelligible language the result at which a jury has arrived, and a verdict that the plaintiffs are “entitled to the sum of two thousand five hundred dollars,” is equivalent to finding the issues in favor of the plaintiffs, and assessing their damages at that sum.³

§ 4702. **Joint Verdict.**—A joint verdict against answering and defaulting defendants is conclusive against all when a separate verdict has not been demanded.⁴ And if no objection or exception is taken to the verdict on that ground in time to afford an opportunity to correct it, the defendants can not afterwards object to the joint verdict and judgment.⁵

§ 4703. **Mining Claims, Verdict in Actions for.**—In an action to recover a quartz ledge when defendants deny plaintiffs’ title and ouster, and set up title in themselves to a part only in the ledge, a special verdict awarding defendants that portion of the ledge they claim, without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs.⁶ The words “more or less,” contained in a verdict, give all between the notices.⁷

§ 4704. **Setting Aside Verdict.**—A court may, of its own motion, set aside the verdict of a jury, when clearly and palpably against the evidence.⁸ A general objection to the form of a verdict, without any specification of particular defects, will not be considered.⁹ A verdict obtained upon incompetent evidence

¹ Downey v. Hicks, 14 How. U.S. 240.

² People v. Dick, 34 Cal. 663.

³ Mendelsohn v. Anaheim L. Co. 40 Cal. 660.

⁴ Anderson v. Parker, 6 Cal. 197; Ellis v. Jeans, 7 Id. 409.

⁵ Hicks v. Coleman, 25 Cal. 122.

⁶ Gonzales v. Leon, 31 Cal. 98.

⁷ Id.

⁸ Duff v. Fisher, 15 Cal. 375.

⁹ Mahoney v. Van Winkle, 21 Cal. 552.

may be set aside, but not if the evidence were admitted without objection.¹ In such case, that which vitiates the verdict is the error of the court in admitting the evidence.² But the admission of improper evidence is no ground for setting aside the verdict where no injury was done thereby to the party objecting.³ Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared merely presumptive, it is otherwise.⁴ The amendment of 1862 to section 193 of the California practice act, allowing the affidavits of jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trial made after its passage.⁵ Such affidavits are not allowed unless it be a chance verdict which is impeached.⁶ A verdict was set aside on the ground of misconduct on the part of the officer in charge.⁷ The affidavits of the jurymen who rendered a verdict, that they misunderstood its effect, can not be received to impeach or defeat it.⁸

§ 4705. **Special Verdict.**—A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It shall present the conclusions of fact as established by the evidence, and not the evidence to prove them, and those conclusions of fact shall be so presented that nothing shall remain to the court but to draw the conclusions of law.⁹ In all cases other than for the recovery of money only, or specific real property, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they return a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon.¹⁰ Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.¹¹ When the jury are directed by the court to find a general verdict, and also to make a special finding of facts, and a general verdict is returned in favor of one party, and the findings on the special issues are in favor of the other party, the court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings;

¹ McClond v. O'Neill, 16 Cal. 392.

² Id.

³ Priest v. Union Canal Co., 6 Cal. 170.

⁴ Id.

⁵ Donner v. Palmer, 23 Cal. 40.

⁶ Turner v. Yuba Water and Mining Co., 25 Cal. 397; Boyce v. Stage Co., Id. 460.

⁷ Thomas v. Chapman, 45 Barb. 98; see "New Trial."

⁸ Polhemus v. Heiman, 50 Cal. 438.

⁹ Cal. Code C. P., sec. 624.

¹⁰ Id., sec. 625.

¹¹ Id.

if not, then judgment should be rendered on the general verdict.¹ A special verdict must find the facts expressly and specially, and not generally or impliedly.² And the findings must be distinct,³ and not equivocal. Such verdict settles the facts, and the court by its judgment pronounces the conclusions of law upon the facts so found.⁴ And if the party dissatisfied fails to move for a new trial, the verdict is conclusive on the facts.⁵ The court, having directed the jury to find a special verdict upon questions submitted in writing to their consideration, may withdraw any of such questions, and instruct them that they need not answer. This is purely a matter of discretion, over which the court, on appeal, will not exercise control.⁶

§ 4706. **Verdict by Stipulation.**—A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results.⁷

§ 4707. **Verdict Sustained.**—When the jury found the only issues involved in the controversy, an exception to the verdict, that no verdict was found upon the issue presented by the pleadings, will not be sustained.⁸ Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of.⁹ Objection can not be taken on a writ of error that the verdict in a trial where there were several issues was that the jury found the “issue” for the plaintiff.¹⁰

§ 4708. **Declaring Verdict.**—When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict; if any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party require the jury to be polled, the verdict is

¹ *McDermott v. Higby*, 23 Cal. 489.

² Cal. Code C. P., sec. 624; *Breeze v. Doyle*, 19 Cal. 102.

³ *Woodson v. McCune*, 17 Cal. 298.

⁴ *Allen v. Hill*, 16 Cal. 113.

⁵ *Garwood v. Simpson*, 8 Cal. 101; *Duff v. Fisher*, 15 Id. 380.

⁶ *Taylor v. Ketchum*, 5 Robt. 507; S. C., 35 How. Pr. 296.

⁷ *Suñol v. Hepburn*, 1 Cal. 258.

⁸ *Burritt v. Gibson*, 3 Cal. 396.

⁹ *Townsend v. Jemison*, 7 How. U. S. 706.

¹⁰ *Laber v. Cooper*, 7 Wall. 565.

complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if any one answer in the negative, the jury must again be sent out.¹ Upon the rendition of the verdict, the court orders judgment to be entered up accordingly.

CHAPTER V.

TRIAL BY REFEREES.

§ 4709. **In General.**—A reference may be ordered, upon the agreement of the parties, filed with the clerk or entered in the minutes: 1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon; 2. To ascertain a fact necessary to enable the court to determine an action or proceeding.² The consent of a party to an order of reference must be in writing, or entered on the minutes.³ The court has no power, when either of the parties object, to order a reference, with directions to the referee to report a judgment.⁴ Consent may be given by oral consent, in open court, entered on the minutes.⁵ An order of court is necessary to constitute a reference, and no reference is good, as such, without an order.⁶ In California, the whole issue in divorce cases can not be referred even by stipulation of parties. The referee, in such cases, is but a master to take testimony.⁷ In New York, after issue joined, the parties have an absolute right to a reference of all the issues, and the proper order to be procured is an order to hear and determine the issues. It is only in cases where no issue is joined, or where some interlocutory question is involved, that a reference in a divorce case simply to take and report evidence is allowable.⁸ The order of

¹ Cal Code C. P., sec. 618.

² Cal. Code C. P., sec. 638; N. Y. Code, sec. 1011; Ohio Code, sec. 281; Laws of Oregon, sec. 218; Nevada, sec. 184; Wash. Ter., sec. 250; Idaho, sec. 191; Arizona, sec. 184; 2 Till. & Shear. Pr. 516.

³ Smith v. Polack, 2 Cal. 92. This decision applies only to cases at common law: Smith v. Rowe, 4 Id. 6.

⁴ Williams v. Benton, 24 Cal. 424.

⁵ Bates v. Vischer, 2 Cal. 355; People v. McGinnis, 1 Park. Cr. 387; Keator v. Ulster Plk. Road Co., 7 How. Pr. 41; Bloore v. Potter, 9

Wend. 480; Leaycroft v. Fowler, 7 How. Pr. 259; see Diddell v. Diddell, 3 Abb. Pr. 167, and note on page 171.

⁶ Heslep v. San Francisco, 4 Cal. 4; Bonner v. McPhail, 31 Barb. 106.

⁷ Baker v. Baker, 10 Cal. 527; Cal. Civil Code, sec. 130.

⁸ Sullivan v. Sullivan, 52 How. Pr. 453. This decision was under the former New York code; now, by section 1012 of the present New York code, the court may, in its discretion, grant or refuse a reference; and where a reference is granted, the court must designate the referee.

reference can not go beyond the pleadings;¹ and must conform to the stipulation.² Where a cause has been referred by stipulation of the parties, to take evidence and report a judgment, and the referee reports a judgment which is entered, and the court subsequently grants a new trial, it can not again refer the case to the same or another referee without a new consent.³

§ 4710. **Compulsory Reference.**—When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: 1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein; 2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect; 3. When a question of fact other than upon the pleadings arises, upon motion or otherwise, in any stage of the action; 4. When it is necessary for the information of the court in a special proceeding.⁴ A compulsory reference of an action as involving a long account can be ordered where the accounts to be examined are the immediate object of the suit, or the ground of the defense. They must be directly, and not incidentally and collaterally, involved.⁵ In an action requiring the examination of a long account on the trial of an issue of fact, a compulsory order of reference is proper, notwithstanding the complaint may contain allegations of fraud, which constitute ground for the arrest of the defendant, and he has been arrested thereon.⁶ When the court has decided the principles upon which an account should be taken and settled, it is the duty of the referee to take the account in pursuance of the principles thus settled; it is not competent for him to review the action of the court.⁷ If a collateral matter not raised by the pleadings be sent to a referee under the second and third sections of the California code of civil procedure, section 639, a motion for new trial is not necessary to bring the action of the referee before the court for review. The finding of the referee in such case does not

¹ Branger v. Chevalier, 9 Cal. 361.

² Haner v. Bliss, 7 How. Pr. 246; see also Scudder v. Snow, 29 Id. 95.

³ Daverkosen v. Kelley, 43 Cal. 477.

⁴ Cal. Code C. P., sec. 639; see N. Y. Code, secs. 1013 to 1015; Nevada, sec. 185; Oregon, sec. 219. As to reference where judgment is taken upon failure to answer, see Cal. Code

C. P., sec. 585, subd. 2; judgment for defendant upon an issue of law, Id. sec. 636.

⁵ Kain v. Delano, 11 Abb. Pr., N. S., 29.

⁶ Atocha v. Garcia, 15 Abb. Pr. 303; S. C., 24 How. Pr. 186.

⁷ Smith v. Walker, 38 Cal. 385.

take the place of a special verdict, and is not binding on the court until adopted by it.¹

An account is a statement of commercial or pecuniary transactions between parties, occurring at various times.² Bill of articles delivered at one time is not an account;³ nor a single bill of lading containing items;⁴ nor numerous items of damage;⁵ nor of articles lost in an action upon an insurance policy;⁶ nor claim for numerous articles under a single obligation.⁷ When the taking of an account is required, it is in the discretion of the court to take the account, or to refer it to a commissioner or referee.⁸ In an action at law, the necessity of taking a long account will not authorize the court to refer the case without the consent of parties.⁹ It can not be ordered merely on the ground that if plaintiff recovers judgment such examination will become necessary;¹⁰ though such account may be taken before main issues are tried by a jury, reserving those issues for such trial.¹¹ In an action for balance of account, the defense was payment by a promissory note; replication, that plaintiff was induced to receive the note by fraudulent representations: it was held that the case was not referable without written consent of both parties.¹² And in an action to dissolve a partnership, the court may order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts; but it has no power, if objection is made, to order a reference of any other issue, or to direct referees to report a judgment;¹³ and an averment in the answer that the accounts had been adjusted, and that the parties had "not taken any new contracts since," is held not sufficient to prevent a reference.¹⁴ On an application for the protection of an attorney's lien, the court has power to refer the question without consent.¹⁵ In actions other than those arising upon contract for the recovery of money or damages only, if no answer has been filed

¹ Harris v. S. F. S. R. Co., 41 Cal. 393.

² Freeman v. Atlantic Mutual Ins. Co., 13 Abb. Pr. 124.

³ Swift v. Wells, 2 How. Pr. 79; Miller v. Hooker, Id. 171; Stewart v. Elwele, 3 Code R. 139.

⁴ Miller v. Hooker, 2 How. Pr. 171.

⁵ Dewey v. Field, 13 How. Pr. 437; McCullough v. Brodie, Id. 346; Sharp v. Mayor of New York, 9 Abb. Pr. 426; S. C., 18 How. Pr. 213.

⁶ Freeman v. Atlantic etc. Ins. Co., 13 Abb. Pr. 124; but to the contrary, see Lewis v. Irving Fire Ins. Co., 15 Id. 303.

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⁷ Van Rensselaer v. Jewett, 6 Hill, 373.

⁸ Hidden v. Jordan, 28 Cal. 301.

⁹ Grim v. Norris, 19 Cal. 140.

¹⁰ Cameron v. Freeman, 10 Abb. Pr. 333; S. C., 18 How. Pr. 310; Keeler v. Poughkeepsie etc. Co., 10 Id. 11.

¹¹ Bowman v. Sheldon, 1 Duer, 607.

¹² Seaman v. Mariani, 1 Cal. 336.

¹³ Williams v. Benton, 24 Cal. 425.

¹⁴ Kennedy v. Shilton, 1 Hilt. 546; S. C. (note to Pratt v. Stiles), 9 Abb. Pr. 157.

¹⁵ Ackerman v. Ackerman, 14 Abb. Pr. 229; but compare Fox v. Fox, 24 How. Pr. 409.

after default entered, if the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose.¹

§ 4711. Affidavit for Order of Reference.

Form No. 1133.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff in the above-entitled action.

II. That said action is brought to obtain a dissolution of the copartnership heretofore and now existing between plaintiff and defendant, and for an accounting and settlement of the affairs of said copartnership [or otherwise state the nature of the action].

III. That issue was joined in said cause on the day of, 18.., on which day the defendant filed his answer therein [state substance of the answer, if necessary, to show that the taking of an account is required].

IV. That the examination of a long account, to wit, the accounts of the business transactions of said copartnership, is necessary to a complete determination of the rights of the parties hereto [or otherwise show that the examination of an account is necessary on either side].

[JURAT.]

[SIGNATURE.]²

§ 4712. Order of Reference.

Form No. 1134.

[TITLE.]

The motion for an order of reference in this cause, coming on this day to be heard on the affidavit of A. B., and the papers, pleadings, and records in said cause, and after hearing E. F., of counsel for the plaintiff, in favor of said motion, and G. H. in opposition thereto, it appearing to the court that an examination of a long account is necessary to a complete determination of the rights of the parties:

It is hereby ordered that this cause be and the same is hereby referred to P. R., esq., to examine the accounts of the copartnership heretofore existing between plaintiff and defendant, and report to the court the present state of the business of said copartnership in a summarized form, with the value of its assets and liabilities, and the accounts of each of said copartners with the said firm.

[DATE.]

[SIGNATURE.]

¹ Cal. Code C. P., sec. 585, subd. 2; Nevada, sec. 125, subd. 2.

² Notice of motion should be given in the usual form.

§ 4713. **Order of Reference—Practice thereon—Affidavit.**—The motion must be made on affidavit showing that issue is joined.¹ The affidavit should be made by the party himself, or show sufficient excuse for his not doing so.²

§ 4714. **Confession of Judgment.**—A reference with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to a reference the question as to what amount, if any, is still unpaid on the judgment.³

§ 4715. **Equity Cases.**—In an equity case where the trial of an issue of a fact involved requires the examination of a long account, the court may order a reference with directions to report upon the account, or any issue of fact involved in the account.⁴ Not only must there be an account, but it must be a long one; four items, nor yet seven, will not constitute such an account.⁵

§ 4716. **Duties of Referees.**—It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts.⁶ A referee must keep as free from outside influence, or the influence of the parties, as jurors,⁷ and can not be a witness in a proceeding had before him.⁸

§ 4717. **Motion, when Made.**—The motion should not be made while an issue of law remains undecided, which, if decided in a particular way, would dispose of all the issues of fact. In short, it ought not to be made till the cause is ready for trial, though it may be made immediately upon joinder of issue, without waiting for a possible amendment of course by the adverse party.⁹ And either party may have order of reference revoked or reconsidered, if such amendment be made.¹⁰ It ought to be made before notice of trial.

§ 4718. **Motion Opposed.**—When the motion is opposed, on the ground that difficult questions of law are involved, an affidavit to that effect should be submitted, showing what ques-

¹ Jansen v. Tappen, 3 Cow. 34.

² Mesick v. Smith, 2 How. Pr. 7; Ross v. Beecher, Id. 157; Little v. Bigelow, Id. 164; Wood v. Crowner, 4 Hill, 548.

³ Solomon v. Maguire, 29 Cal. 227.

⁴ Williams v. Benton, 24 Cal. 425.

⁵ Parker v. Snell, 10 Wend. 577;

Harris v. Mead, 16 Abb. Pr. 257; Smith v. Brown, 3 How. Pr. 9.

⁶ Hihn v. Peck, 30 Cal. 280.

⁷ Dorlon v. Lewis, 9 How. Pr., 1; Yale v. Gwinits, 4 Id. 253.

⁸ Morss v. Morss, 11 Barb. 510.

⁹ Enos v. Thomas, 4 How. Pr. 290.

¹⁰ Beardsley v. Stover, 7 How. Pr. 394.

tions are involved.¹ And questions of law must be clearly stated.² It is not a sufficient objection to a motion for reference to show that the action was in a previous trial left to a jury.³ An offer to admit upon the trial the items of an account upon stipulation will defeat the motion.⁴

§ 4719. **Notice of Motion.**—In general, a notice of motion is necessary, though the court may, upon its own motion, order a reference on the hearing, without any formal motion or previous notice.⁵

§ 4720. **Number and Residence of Referees.**—A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending.⁶ In New York, by agreement of parties, there may be five in number.⁷ When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.⁸

§ 4721. **Objections to Referees.**—Objections to the appointment of any person as referee may be made on grounds substantially the same as challenges to jurors, for cause, except that the prohibited degree of relationship is the third instead of the fourth, and also a modification in the sixth ground.⁹ And objections so taken must be heard and disposed of by the court; affidavits may be read, and any person examined as a witness in reference to such objections.¹⁰ The fact that the referee, in proceeding supplementary to execution, was the clerk of the attaching creditor is not any considerable evidence of fraud.¹¹ The statute concerning references does not require that referees should be sworn;¹² but in New York the oath may be waived.¹³

§ 4722. **Partition, Action of.**—The appointment of referees to try all the issues in actions for partition is governed by the

¹ Dewey v. Field, 13 How. Pr. 437; Salisbury v. Scott, 6 Johns. 329; Barber v. Cromwell, 10 How. Pr. 351.

² Salisbury v. Scott, 6 Johns. 329; Anon., 5 Cow. 423.

³ Brown v. Bradshaw, 1 Duer, 634; 8 How. Pr. 176.

⁴ Mullin v. Kelly, 3 How. Pr. 12.

⁵ Kelly v. Searing, 4 Abb. Pr. 354;

⁶ Cal. Code C. P., sec. 640; Nevada, sec. 186.

⁷ N. Y. Code, sec. 1025.

⁸ Cal. Code C. P., sec. 1053; N. Y.

Code, sec. 1026; and Jackson v. Ives, 22 Wend. 637.

⁹ Cal. Code C. P., sec. 641; Laws of Oregon, sec. 22; Nevada, sec. 187; Idaho, 195; Arizona, sec. 187.

¹⁰ Cal. Code C. P., sec. 642; Laws of Nevada, sec. 188.

¹¹ Adams v. Hackett, 7 Cal. 187.

¹² Sloan v. Smith, 3 Cal. 406. In New York and Ohio it is otherwise: Ohio Code, sec. 288; N. Y. Code, sec. 1016.

¹³ Id.

general provisions of the practice act, and can only be made upon the agreement of all the parties.¹ It is erroneous for the court to order a reference for the purpose of trying all the issues in an action for partition in which there is a party whose name is unknown, and whose consent can not therefore be procured, and all proceedings thereon must fall.²

§ 4723. **Power of Referees.**—Under a reference to try issues and report a judgment, the referee can exercise all the powers of a judge in relation to the trial of a cause referred to him.³ But the order must be entered to confer such power fully.⁴ A referee has power to dismiss plaintiff's complaint on his failure to appear, or to prosecute after appearance.⁵ He may give judgment on the pleadings for plaintiff where the answer does not constitute a defense.⁶ A court commissioner has no jurisdiction to hear a motion or to make any order in reference to the dissolution of an injunction, unless the motion is referred to him by the court.⁷ It is the business of a referee appointed to take evidence to take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is or is not competent;⁸ and if objections taken before the referee are not renewed before the court on trial, and ruling had thereon, they are not available on appeal.⁹ Referees have no power to allow pleadings to be amended after a case has been submitted to them.¹⁰ It is directly otherwise in New York practice.¹¹ A referee can not delegate his authority, nor try a cause by deputy.¹²

§ 4724. **Title.**—References may be ordered to examine title; *e. g.*, an action for specific performance, but not, however, before judgment, if any other question than that of title be in dispute;¹³ unless all other questions are frivolous.¹⁴ And, after

¹ *Hastings v. Cunningham*, 35 Cal. 549.

² *Id.*; and Cal. Code C. P., sec. 761 et seq.

³ *Plant v. Fleming*, 20 Cal. 92; *Woodruff v. Dickie*, 31 How. Pr. 164.

⁴ *Bonner v. McPhail*, 31 Barb. 106.

⁵ *Morange v. Meigs*, 54 N. Y. 207.

⁶ *Schuyler v. Smith*, 51 N. Y. 309.

⁷ *Stone v. Bunker Hill Co.*, 28 Cal. 497.

⁸ *Scott v. Williams*, 23 How. Pr. 393; 14 Abb. Pr. 70.

⁹ *Fox v. Moyer*, 54 N. Y. 125.

¹⁰ *De la Riva v. Berreyesa*, 2 Cal. 195.

¹¹ See N. Y. Code, sec. 1018, superseding *Billings v. Baker*, 6 Abb. Pr. 213.

¹² *Schultz v. Whitney*, 9 Abb. Pr.

71; S. C., 17 How. Pr. 471; *Heyer v. Deaves*, 2 Johns. Ch. 154.

¹³ *Blyth v. Elmhirst*, 1 Ves. & B. 1; *Paton v. Rogers*, Id. 351; *Morgan v. Shaw*, 2 Meriv. 138; *Portman v. Mill*, 2 Russ. 570; *Gordon v. Ball*, 1 Sim. & Stu. 178.

¹⁴ *Wood v. Machu*, 5 Hare, 158; *Boyes v. Liddell*, 1 You. & Coll. 133; *Boehm v. Wood*, 1 Jac. & W. 419; *Withy v. Cottle*, Turn. & Russ. 78. As to what order of reference may contain on examination of title, see *Bennett v. Rees*, 1 Keen, 405; *Anon.*, 3 Madd. 495; *Hyde v. Wroughton*, Id. 279; *Jennings v. Hopton*, 1 Id. 211, overruling *Gibson v. Clark*, 2 Ves. & B. 103; and compare *Luban v. Lightbody*, 8 Price, 606; and see *Birch v. Haynes*, 2 Meriv. 444.

some conflict of decisions, it appears to be settled that the order may contain a direction that referee may ascertain not only whether there is a good title, but when such title was perfected.¹

§ 4725. **Conduct of the Trial.**—A trial before referees should be conducted in the same manner as before a court.² And the evidence should be embodied in a bill of exceptions, and certified by the referee.³ Where a reference is had to take an account, it is within the discretion of the referee to open the case, after it is once closed, for the purpose of receiving additional testimony;⁴ even after they have announced their decision;⁵ though not after they have signed their report and given notice thereof to either party;⁶ nor after it has been filed;⁷ nor has a referee a right to bring in and file an additional or amended report.⁸

Where a referee admits the testimony of a witness against the objection of a defendant, such testimony can not afterwards be thrown out without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony,⁹ unless no possible evidence would be admissible upon the point,¹⁰ or unless proper warning be given to the parties, at the time it is received, that it will be stricken out unless other evidence necessary to make it valid is furnished.¹¹ Referees should observe the rules of evidence.¹²

§ 4726. **Findings of Referee.**—The report of a referee must separately state the facts found and the conclusions of law thereon.¹³ The report must be made within twenty days after the testimony is closed.¹⁴ Under the former California statute this was held to be directory merely, and a failure to file within the time neither invalidates the report nor a judgment thereon.¹⁵

¹ *Bennett v. Rees*, 1 Keen, 405; *Hyde v. Wroughton*, 3 Madd. 279.

² *Goodrich v. City of Marysville*, 5 Cal. 430; *Phelps v. Peabody*, 7 Id. 50.

³ *Goodrich v. City of Marysville*, 5 Cal. 430; *Poire v. Rocky Mt. T. Co.*, 4 West Coast Rep. 557.

⁴ *Marziou v. Pioche*, 10 Cal. 545; *Delafield v. De Granw.*, 9 Bosw. 1; *Duguid v. Ogilvie*, 3 E. D. Smith, 527; *Cleveland v. Hunter*, 1 Wend. 194.

⁵ *Ayrault v. Sackett*, 17 How. Pr. 507; affirming *Id.*, p. 461; *Pratt v. Stiles*, 9 Abb. Pr. 154.

⁶ *Shearman v. Justice*, 22 How. Pr. 241.

⁷ *Niles v. Price*, 23 How. Pr. 473.

⁸ *Headley v. Reed*, 2 Cal. 325.

⁹ *Monson v. Cooke*, 5 Cal. 436; *Mey-*

ers v. Betts, 5 Denio, 81; *Clussman v. Merkel*, 3 Bosw. 402; *Allen v. Way*, 7 Barb. 585; *Johnson v. McIntosh*, 31 Id. 267.

¹⁰ *Brown v. Colie*, 1 E. D. Smith, 265.

¹¹ *Brooks v. Christopher*, 5 Duer, 216.

¹² *De la Riva v. Berreyesa*, 2 Cal. 195.

¹³ Cal. Code C. P., sec. 643; N. Y. Code, sec. 1022; *Lambert v. Smith*, 3 Cal. 408; *Roberts v. Carter*, 28 Barb. 462; S. C., 17 How. Pr. 524; *Church v. Erben*, 4 Sandf. 691; *Tilman v. Keane*, 1 Abb. Pr., N. S., 23; *Wright v. Sanders*, 28 How. Pr. 395; *Niles v. Battershall*, 27 Id. 381; *Toll v. Whitney*, 18 Id. 161.

¹⁴ Cal. Code C. P., sec. 643.

¹⁵ *Keller v. Sutrick*, 22 Cal. 471.

In Nevada it is held that if a referee fails to make his report within the time ordered by the court, he may be removed on the application of either party, but if not removed, his authority does not expire.¹ In New York also it has been held that the requirement as to the time within which the report must be filed was absolute, but the section of the New York code, section 1019, differs materially from the California code of civil procedure, section 643. Under a reference upon all the issues, the report must pass upon them all,² except those upon which no evidence is offered.³ Everything necessary to support the judgment must be inserted in the statement of facts;⁴ nothing must be left to inference, though a finding of fact may be interpreted by a finding of law.⁵

The decision of a referee stands on the same footing as that of a judge or the verdict of a jury, and, though unsatisfactory, will be conclusive on a question of fact, if there is any evidence to support it.⁶ But not so as to conclusions of fact drawn from the pleadings alone.⁷ When the order of reference requires the referee to try the issues and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect.⁸ The report of a referee and the award of an arbitrator are in all essentials the same.⁹ The findings of facts by a referee are presumed to be based on sufficient evidence, where no statement on motion for a new trial appears in the transcript on appeal.¹⁰

§ 4727. Report of Referee.

Form No. 1135.

[TITLE.]

To the Court:

Pursuant to an order of this court in this action, made on the day of, I, the undersigned court commissioner [or referee], report:

I. That I have been attended by the attorneys for the sev-

¹ Rhodes v. Williams, 12 Nev. 21.

² Solomon v. Maguire, 29 Cal. 227; Rogers v. Beard, 20 How. Pr. 282; Van Steenburgh v. Hoffman, 6 Id. 492.

³ Ingraham v. Gilbert, 20 Barb. 151; Patterson v. Graves, 11 How. Pr. 91.

⁴ Tomlinson v. Mayor of N. Y., 23 Id. 452; Hickok v. Bliss, 34 Barb. 321.

⁵ Smith v. Devlin, 33 N. Y. 363.

⁶ Knowles v. Joost, 13 Cal. 620; Muller v. Boggs, 25 Id. 179; Peck v. Vandenberg, 30 Id. 11; Ball v. Loo-

mis, 29 N. Y. 412; Kerr v. McGuire, 28 Id. 446; S. C., 28 How. Pr. 27; McMahon v. Allen, 32 Id. 313; Graham v. Chrystal, Id. 287; Colwell v. Lawrence, 24 Id. 324; Fitch v. Carpenter, 43 Barb. 40; Platt v. Thorn, 8 Bosw. 574; Morris v. Second Av. R. R. Co., Id. 679.

⁷ Simmons v. Sisson, 26 N. Y. 264.

⁸ Hihn v. Peck, 30 Cal. 280.

⁹ Headley v. Reed, 2 Cal. 322; Tyson v. Wells, Id. 122; Grayson v. Guild, 4 Id. 122.

¹⁰ Donahue v. Cromartie, 21 Cal. 80.

eral parties who appeared in this action [name who appeared for plaintiff and who for defendant], and I proceeded to a hearing of the matter so referred. I further report that on such hearing the books, deeds, papers, and vouchers of the said [partnership] have been produced before me, and both parties have rendered their respective accounts, which are hereto annexed, and marked "Schedule A."

II. That I examined said concerning the transactions [state what], and adjusted a mutual account between and, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, marked "Schedule B."

III. That said owes to said partnership, etc. [state facts].

IV. That the balance shown by said schedule B [state its apportionment].

[DATE.]

[SIGNATURE.]¹

§ 4728. **Decree upon Report.**—In a suit in chancery it is perfectly competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause.²

§ 4729. **Exceptions.**—The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court.³ Exceptions must be taken during the progress of the trial to the rulings of the referee in the same manner as before a court.⁴ Exceptions to the report must be specific, not general.⁵ If there be no exceptions embodied in the report showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions being not disclosed, the court can not disturb the report, and an order granting a new trial will be reversed.⁶ But if it appear that the evidence was insufficient to justify the decision, the court may

¹ In proper cases the report may take the form of a finding upon trial by the court, with modifications of the reading: See, *ante*, "Trial by the Court," "Findings."

² *McHenry v. Moore*, 5 Cal. 90.

³ Cal. Code C. P., sec. 645; *Porter v. Barling*, 2 Cal. 72.

⁴ *Phelps v. Peabody*, 7 Cal. 50; *Branger v. Chevalier*, 9 Id. 353; *Belmont v. Smith*, 1 Duer, 675.

⁵ *Newell v. Doty*, 33 N. Y. 83; *Graham v. Chrystal*, 1 Abb. Pr., N. S., 121; *Pearson v. Knapp*, 1 Myl. & K. 312; *Ward v. Fitzhugh*, 7 Sim. 42; *Gompertz v. Best*, 1 You. & Coll. 114; but see *Woods v. Woods*, 10 Sim. 197; *Moore v. Langford*, 6 Sim. 323; *Cullen v. Dean of Kildare*, 2 Irish Ch. 133; *Stocken v. Dawson*, 2 Phil. 141.

⁶ *Tyson v. Wells*, 2 Cal. 122.

grant a new trial.¹ When a case is referred to a referee, under the statute, to hear and determine the issues of law and of fact, and report the same to the court, and he makes his report, wherein no errors of law or of fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial.²

§ 4730. **Setting Aside Report of Referee—Error must be Apparent.**—The report of the referee can not be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial, upon exceptions taken at the trial, or the evidence certified.³ And the party objecting must see that such testimony as he relies on is properly certified.⁴ The *onus* is upon the party who alleges that error was committed to make it appear that such was the case.⁵ The error complained of, whether of law or fact, must appear on the face of the award or report.⁶ For error in the report of a referee, the same may be set aside, and a new reference ordered.⁷

§ 4731. **Grounds of Objection.**—A court can not interfere and set aside the report of a referee upon the same ground as it will proceed to set aside the verdict of a jury.⁸ When the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report, and for a new trial.⁹ If a report does not pass upon all the issues referred, it should be set aside,¹⁰ and so should a report which does not find the issues of law and fact separately.¹¹

§ 4732. **Insufficient Grounds.**—It is error for the court to set aside the report of a referee, upon an examination of testimony which was not properly before it.¹² The court will not disturb the award of an arbitrator or report of a referee unless the error complained of, whether of law or fact, appear on the face of the award or report.¹³ The defect of a plea, though it be bad on demurrer, is not sufficient reason to set aside the report, after submission to a referee.¹⁴ The decision of a referee upon a question of fact will not be set aside where the evidence is conflicting.¹⁵ Where there is a large mass of contradictory

¹ Cappe v. Brizzolara, 19 Cal. 607.

² Grayson v. Guild, 4 Cal. 125.

³ Goodrich v. City of Marysville, 5 Cal. 430.

⁴ Mead v. Bunn, 32 N. Y. 275.

⁵ Tyson v. Wells, 2 Cal. 122.

⁶ Hidden v. Jordan, 32 Cal. 397.

⁷ McHenry v. Moore, 5 Cal. 90; Dorlon v. Lewis, 9 How. Pr. 1; Roosa v. Saugerties Turnpike Co., 12 Id. 297.

⁸ Branger v. Chevalier, 9 Cal. 353.

⁹ Pratt v. Stiles, 9 Abb. Pr. 156; S. C., 17 How. Pr. 211.

¹⁰ Hulce v. Sherman, 13 How. Pr. 511; Church v. Erben, 4 Sandf. 691.

¹¹ Goodrich v. City of Marysville, 5 Cal. 430.

¹² Tyson v. Wells, 2 Cal. 122.

¹³ Ritchie v. Davis, 5 Cal. 453.

¹⁴ Brady v. Brown, 20 Cal. 520.

evidence reported, it will be presumed that the court weighed the evidence properly in setting aside the finding of the facts by the referee.¹ It would be gross abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge.²

§ 4733. **Motion to Set Aside.**—The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, depends on the character of the reference. If it be special, the report has the effect of a special verdict;³ if general, it stands as the decision of the court, and judgment may be entered thereon, exceptions taken and reviewed, as if action had been tried by the court;⁴ but if it be of a collateral matter, not an issue raised by the pleadings, it does not take the place of a special verdict, nor is it binding on the court until adopted, nor is a motion for new trial necessary in order to bring it up for review.⁵ Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of the motion.⁶

§ 4734. **Power of Court.**—A court has power to set aside the report of a referee, and grant a new trial, on the ground that the evidence before the referee did not justify his decision.⁷ But exceptions to the ruling of the referee must have been taken at the trial. If the referee reports the facts upon all the issues, but draws an erroneous conclusion of law from the facts found, the court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered.⁸ It is not good practice, where a referee has reported findings of facts, for the court to strike out a finding made by the referee and substitute one of its own; but if the appellant is not prejudiced by such action, it will not be sufficient ground to award a new trial.⁹ The court will not interfere with the exercise of a sound discretion by the referee in a matter properly resting in such discretion; *e. g.*, order him to open the case of either party to receive additional testimony after the case is closed.¹⁰

¹ McHenry v. Moore, 5 Cal. 90.

² Goodrich v. City of Marysville, 5 Cal. 430.

³ Cal. Code C. P., sec. 645.

⁴ Id., secs. 644, 645; Peabody v. Phelps, 9 Cal. 213; Harris v. S. F. S. R. Co., 41 Id. 393.

⁵ Id. As to time within which notice of motion must be given to set aside report, see Cal. Code C. P., sec. 659.

⁶ Mahoney v. Wilson, 15 Cal. 43;

Frank v. Doane, Id. 303; Green v. Doane, Id. 304.

⁷ See Cal. Code C. P., sec. 657; Cappe v. Brizzolara, 19 Cal. 607.

⁸ Calderwood v. Pyser, 31 Cal. 333; Scott v. Pilkington, 15 Abb. Pr. 280; Merritt v. Millard, 10 Bosw. 309.

⁹ Pratalongo v. Larco, 47 Cal. 378.

¹⁰ Dow v. Darragh, 10 J. & Sp. (N. Y.) 80.

§ 4735. **Judgment on Report—Duty of Court.**—A reference is a substitution for a jury, and a judgment should be had on the report as upon a verdict, and a motion to set aside the report is necessary before the appellate court can be required to examine the report and set it aside.¹ So with the report of a referee upon conflicting testimony, which will not be set aside upon an appeal from an order refusing to grant a new trial.² If the report of a referee under the statute contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with it.³ A *mandamus* lies to compel the judge of a district court to enter judgment on the report of a referee.⁴

§ 4736. **Grounds for Appeal.**—An order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference, may be reviewed on an appeal from a final judgment.⁵ When an erroneous judgment has been entered in the court below in favor of the plaintiff on the report of a referee, and the report has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the supreme court will correct both errors at the same time, in a chancery case.⁶ If the commissioner to whom a case has been referred to take an account commits an error at the threshold which unsettles the account, the court is not bound to go over the account and correct the error, but may set aside the report and again refer the case.⁷ The supreme court will not review a judgment entered on the report of a referee if no objection was made to it in the court below.⁸ So where the testimony is conflicting, the supreme court will not disturb the findings.⁹ Nor will it review the findings to ascertain whether they are contrary to the evidence except on appeal from an order denying a new trial.¹⁰ An order setting aside a report of a referee appointed to take an account is merely interlocutory, and not subject to appeal before judgment.¹¹ So of an order setting aside a finding in a divorce case, and sending the case back to the referee for further testimony.¹² It seems that a stay of proceedings granted on an appeal from an order of reference is proper.¹³

¹ Gunter v. Sanchez, 1 Cal. 48.

² Ritchie v. Bradshaw, 5 Cal. 229.

³ Headley v. Reed, 2 Cal. 322.

⁴ Russell v. Elliott, 2 Cal. 246.

⁵ Hihn v. Peck, 30 Cal. 280.

⁶ Grayson v. Guild, 4 Cal. 125.

⁷ Hidden v. Jordan, 32 Cal. 397.

⁸ Porter v. Barling, 2 Cal. 72.

⁹ Muller v. Boggs, 25 Cal. 179.

¹⁰ Peck v. Vandenberg, 30 Cal. 11.

¹¹ Johnston v. Dopkins, 6 Cal. 83.

¹² Baker v. Baker, 10 Cal. 528.

¹³ Smith v. Polack, 2 Cal. 94.

§ 4737. **May be Set Aside.**—Judgment is entered upon the report of a referee as matter of course, and the only mode of taking advantage of it is by moving to set it aside, as on motion for a new trial.¹ After rendition of judgment, the court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the report of any arbitrator.² The provisions of the practice act relating to new trials are general, and vest in courts the same power in cases tried by a referee as in other cases.³ But those provisions only apply in case of the trial of an issue raised by the pleadings; as to collateral matters referred, no motion for new trial is necessary.⁴

CHAPTER VI.

EXCEPTIONS.

§ 4738. **In General.**—An exception is an objection usually made during the trial of a cause, and which would not appear of record in the case unless so taken. It is always interposed upon the theory that some ruling had been made by the court which is erroneous, and to which erroneous decision or ruling the party makes an objection. Such exception is either noted by the clerk of the court or the official reporter, if there be one, or in the judge's minutes, or what is more usual, and indeed the better practice, it is briefly written out by the attorney objecting at the time, and then corrected and signed by the court, and thus becomes a bill of exception, on which the party may appeal to the supreme court without further assignment of errors.⁵ An exception to secure a reversal of the decision must go to some vital point, something material: not to a mere slight or trifling error. It is not every error which will be reviewed by an appellate court. The exception should state the point with clearness, so that there can be no question in the higher courts relative to what the question is. No particular form is necessary to be adopted. Any language written even in a very informal manner, if it points out the alleged error with clearness, is good. No specific rule can be laid down to govern each case, but one thing should always be the rule: an objection should not be interposed at random with the hope merely of saving a point

¹ Headley v. Reed, 2 Cal. 322;
Sloan v. Smith, 3 Id. 406.

³ Cappe v. Brizzolara, 19 Cal. 607.

² Sloan v. Smith, 3 Cal. 406; Head-
ley v. Reed, 2 Id. 322.

⁴ Harris v. S. F. S. R. Co., 41 Cal.

393.

⁵ See Cal. Code C. P., sec. 646.

not then in sight. An exception is taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time, from the calling of the action for trial to the rendering of the verdict or decision.¹ The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing an amendment to a pleading, striking out a pleading or portion thereof, refusing a continuance, an order made upon *ex parte* application, and an order or decision made in the absence of a party, are deemed to have been excepted to.² The sole object of a bill of exceptions is to make a record of the special action of the court of what is not record by the general law.³ And it is not necessary to embody therein any matter of record.⁴ But documents and affidavits, to be reviewed by the appellate court, must be embodied in a bill of exceptions or record.⁵ So of affidavits as to the incompetency of a juror.⁶

Where the record on appeal did not contain the whole judgment roll, and the absent portions were not presented in a bill of exceptions or statement on appeal, no questions arising on matters contained in such absent portions can be made an appeal.⁷ But where the bill of exceptions appears upon its face to have been regularly taken, the court can not presume against the record.⁸ Nor will it sustain mere technical exceptions taken in the course of the trial, where the judgment seems right on the merits, unless compelled by law so to do.⁹ If there is a technical variance between the evidence and finding of facts and the pleading, and no objection is made on that ground in the court below, but the objection is taken for the first time in the appellate court, the judgment will not be reversed by reason of such variance.¹⁰ So, likewise, on the ground of variance between pleadings and proof, or of admission of evidence not within the issue,¹¹ or in respect of a defect of the evidence pro-

¹ Quivey v. Gambert, 32 Cal. 304.² Cal. Code C. P., sec. 647.³ Parsons v. Davis, 3 Ind. 425.⁴ Johnson v. Sepulveda, 5 Ind. 149.⁵ Gates v. Buckingham, 4 Cal. 286.⁶ People v. Stonecifer, 6 Cal. 411.⁷ Hastings v. Cunningham, 35 Cal.⁸ United States v. Hodge, 6 How. U. S. 279.⁹ English v. Johnson, 17 Cal. 107.¹⁰ Dickman v. Norris, 36 Cal. 94.¹¹ Com. Bank of Rochester v. Shuart, 46 Barb. 372; Allen v. Merc. Mut. Ins. Co., Id. 642.

duced,¹ or of defects in the pleadings themselves,² or of an erroneous admission or assumption of the existence of matters not proved in fact.³ Where the transcript contained, together with the judgment roll, a copy of an order, certified to by the clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions, it was held that the appellate court could not review the action of the court below upon the demurrer.⁴ A party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and it shall only be necessary to bring to the supreme court a transcript of the pleadings and the judgment, and the bill or bills of exception so taken. A bill of exceptions must be reduced to writing, and settled by the judge within the time prescribed by the statute.⁵

The supreme court notices only the errors committed against the appellant, not those committed against the successful party.⁶ Exceptions taken by the prevailing party are not available to his adversary, unless there be a cross-appeal.⁷ Where the respondent takes no appeal—at least, where he files no transcript and assigns no errors—the judgment will not be reversed at his instance.⁸ It has been the practice of the supreme court to examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent.⁹ The party alleging error on appeal must make it affirmatively appear,¹⁰ as the court will not consider on appeal rulings to which no exception was taken in the court below.¹¹ If parties choose to submit to rulings without taking exceptions, they can not afterwards question them here.¹² And the exception when taken must be specific, and must point out the exact nature and extent of the objection relied on, to be available for a review. But where the ruling is in general terms, a general exception may

¹ Colwell v. Lawrence, 24 How. Pr. 324.

² Simmons v. Sisson, 26 N. Y. 264; Ashley v. Marshall, 29 Id. 494.

³ People v. Third Av. R. R., 30 How. Pr. 121; Paige v. Fazackerly, 36 Barb. 392; McDonald v. Christie, 42 Id. 36.

⁴ Bostwick v. McCorkle, 22 Cal. 669.

⁵ Cal. Code C. P., sec. 650.

⁶ Frank v. Doane, 15 Cal. 304.

⁷ Beach v. Cooke, 28 N. Y. 508; Dougherty v. Henarie, 47 Cal. 13.

⁸ Travers v. Crane, 15 Cal. 12.

⁹ Jackson v. Feather River Water Co., 14 Cal. 18; Poppe v. Athearn, 42 Id. 607.

¹⁰ Todd v. Winants, 36 Cal. 129.

¹¹ Keeran v. Griffith, 34 Cal. 581; Lightner v. Menzell, 35 Id. 452.

¹² Frink v. Alsip, 49 Cal. 105.

suffice.¹ A mere rescript of the testimony by question and answer, with the objections taken and the rulings thereon, will not be considered.²

§ 4739. **Error in Law.**—For error in law excepted to, an appeal lies without motion for a new trial.³ So the granting a nonsuit on the facts is a question of law, and may be reviewed on appeal without motion for a new trial.⁴ When errors of law are relied upon as errors on appeal, the particular errors must be pointed out by the counsel; otherwise they will be disregarded, unless they plainly appear from the transcript on appeal.⁵ Error in law occurring at a trial may be reviewed upon a bill of exceptions, as well as upon a motion for a new trial.⁶ But an order striking out a statement on motion for a new trial can not be brought before the supreme court for review by a bill of exceptions.⁷ On appeal by a plaintiff from an order overruling a motion for a new trial made by him on the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff will not be considered.⁸ The objection that the judgment is not authorized by the pleadings may be taken on an appeal from the judgment roll alone. The fact that a motion for a new trial was made, which did not state this as one of the grounds, does not operate as a waiver of the objection.⁹ The United States supreme court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.¹⁰ Where the court below tries the cause without a jury, the proper mode of reserving questions of law is to ask the court to decide them, and note the refusal in a bill of exceptions.¹¹ Where plaintiffs, having excepted to the ruling of the court excluding certain

¹ Sawyer v. Chambers, 44 Barb. 42; S. C., 43 Id. 622; Collyer v. Collins, 17 Abb. Pr. 467.

² Caldwell v. Parks, 50 Cal. 502; see also People v. Getty, 49 Id. 584; Cal. Code C. P., sec. 648.

³ Rice v. Gashirie, 13 Cal. 53.

⁴ Cravens v. Dewey, 13 Cal. 42; Darst v. Rush, 14 Id. 83.

⁵ Sanchez v. McMahon, 35 Cal. 218. See as to positive waiver of objection on the ground of error of law committed at the trial, unless the exception be taken to it at the time, McCartney v. Fitz-Henry, 16 Cal. 186; Lightner v. Menzel, 35 Id. 452;

King v. Meyer, Id. 646; Henry v. S. P. R. R. Co., 50 Id. 176; Barlow v. Scott, 24 N. Y. 40; Pollen v. Leroy, 10 Bosw. 38; Enos v. Eigenbrodt, 32 N. Y. 444.

⁶ Wall v. Preston, 25 Cal. 61.

⁷ Quivey v. Gambert, 32 Cal. 304. But see Cal. Code C. P., sec. 651; and Lucas v. The City of Marysville, 44 Cal. 212.

⁸ Pierce v. Jackson, 21 Cal. 636.

⁹ Putnam v. Lamphier, 36 Cal. 151.

¹⁰ Garland v. Davis, 4 How. U. S. 131.

¹¹ Griswold v. Sharp, 2 Cal. 17; Lucas v. San Francisco, 28 Id. 591.

evidence, take in consequence of such ruling a nonsuit with leave to move to set aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence are confined on appeal to the grounds taken below.¹

§ 4740. **Exceptions to Evidence—Admission of Evidence.**—A bill of exceptions which says that the paper was offered in evidence does not show that the paper was read in evidence.² An objection to the sufficiency of evidence should be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence.³ An exception must be made, or the objection is waived, and can not afterwards be raised.⁴ Objections to the introduction of evidence must be taken on the trial below; they can not be taken for the first time in the appellate court.⁵ Objections to a deposition can not be made unless taken when it is offered in evidence.⁶

§ 4741. **Documentary Evidence.**—An exception to the admissibility of a deed in evidence must be taken on the trial of the cause, at *nisi prius*. The point can not be considered on appeal.⁷ A statement in a bill of exceptions that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty.⁸

§ 4742. **Irrelevant Testimony.**—If in a trial before the court, without a jury, irrelevant testimony is received, with the understanding that it is not to be considered by the court unless other testimony is afterwards introduced making it relevant, and such testimony is not afterwards introduced, the presumption will be that the court discarded the evidence in rendering judgment, and the error is without consequence.⁹ A conditional exception to evidence, subject to a future decision, must be repeated positively after decision made.¹⁰ Exception is nullified where the defect excepted to is supplied during the

¹ *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 549; *King v. Meyer*, 35 Id. 646.

² *Page v. O'Brien*, 36 Cal. 559.

³ *Goodale v. West*, 5 Cal. 339; *Mott v. Smith*, 16 Id. 533; *Hoxie v. Allen*, 38 N. Y. 175.

⁴ *Castro v. Gill*, 5 Cal. 42; *Letter v. Putney*, 7 Id. 423.

⁵ *Covilland v. Tanner*, 7 Cal. 38;

Fountain v. Pettee, 38 N. Y. 184; *Laber v. Cooper*, 7 Wall. 565.

⁶ *Jones v. Love*, 9 Cal. 70; *Hobbs v. Duff*, 43 Id. 485.

⁷ *Pearson v. Snodgrass*, 5 Cal. 478; *Posten v. Rasette*, Id. 467.

⁸ *Page v. O'Brien*, 36 Cal. 559.

⁹ *Jones v. Morse*, 36 Cal. 205.

¹⁰ *Bihin v. Bihin*, 17 Abb. Pr. 19.

trial.¹ A party can not, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the court below, and after fishing for a verdict, for the first time assign his objections in the supreme court.²

§ 4743. **Insufficiency of Evidence.**—The usual mode in which error in findings, on the ground of insufficiency of evidence to support them, is reached on appeal, is by making such insufficiency a ground of motion for a new trial; but it seems that under the code the party aggrieved may either move for a new trial on that ground, or specify in a bill of exceptions in what respect the evidence did not justify the decision, and take up the evidence upon the point in question.³

§ 4744. **Proving Exceptions.**—If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same.⁴

§ 4745. **Special Exception Necessary.**—Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objection will not do.⁵ The party should lay his finger on the point at the time of trial, otherwise the appellate court can not review it.⁶ A party is confined to the objections raised upon the trial.⁷ General objection is not good unless the evidence objected to be absolutely incompetent, in which case such general objection is available;⁸ or where the testimony could not, under any possible circumstances, have been relevant.⁹ So where error is alleged in the exclusion of testimony, it must clearly appear on the face of the exception that the testimony was, not that possibly it might have been, relevant.¹⁰ Where a defendant's objection to the admission of testimony on the trial is general, he can not be permitted to make it special for the first time in this court.¹¹

§ 4746. **When Exception Lies.**—In New York, the com-

¹ *Cronnse v. Fitch*, 14 Abb. Pr. 346; *Park Bank v. Tilton*, 15 Id. 384.

² *Covillaud v. Tanner*, 7 Cal. 38.

³ *Jones v. Shay*, 50 Cal. 508; see Cal. Code C. P., sec. 648.

⁴ As to the mode, etc., see Cal. Code C. P., sec. 652.

⁵ *People v. Apple*, 7 Cal. 290; *Kiler v. Kimbal*, 10 Id. 267; *Martin v. Travers*, 12 Id. 245.

⁶ *Id.*; *Sneed v. Osborn*, 25 Cal. 619.

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⁷ *Waterville Mfg. Co. v. Brown*, 9 How. Pr. 27; *Smith v. Floyd*, 18 Barb. 523; see, however, *Keyes v. Devlin*, 3 E. D. Smith, 518.

⁸ *Nightingale v. Scannell*, 18 Cal. 315.

⁹ *Dreux v. Domec*, 18 Cal. 83; *Sneed v. Osborn*, 25 Id. 619.

¹⁰ *Cohn v. Mulford*, 15 Cal. 50.

¹¹ *People v. Glenn*, 10 Cal. 32.

ments of the judge upon the evidence are not subject to exception.¹ It is questionable whether an exception lies to an illegal question put by a juror.²

§ 4747. **Exceptions to Findings—Defective Findings.**—Defective findings should be specially excepted to in the court below.³ And the exceptions should point out wherein the defect consists.⁴ But where judgment is rendered upon general or special findings, and a new trial is moved for upon a statement containing the evidence, no special exceptions to presumed findings or motion in the court below is necessary.⁵

§ 4748. **Form, Time for Filing.**—No particular form of exception is required; but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made.⁶

§ 4749. **Want of Findings.**—If there be a material fact in respect to which the findings are silent, the party aggrieved may except to them by pointing out the particular defect or omission complained of, and if the court refuse to correct them, the remedy is by appeal. But if, on any material fact, the court finds contrary to or without sufficient evidence, this is ground for a new trial only.⁷ Where the findings are contrary to or unsupported by the evidence, the only proper proceeding to correct them is a motion for a new trial, and not an exception to the findings.⁸ In case of a want of findings, objection can not be taken unless a finding was asked for and the court omitted or refused the same, and exception was taken to such omission or refusal.⁹

¹ *Nolton v. Moses*, 3 Barb. 31; *Gardner v. Barden*, 34 N. Y. 433.

² *Kelly v. Commonwealth Ins. Co. of Penn.*, 10 Bosw. 82.

³ *Troy v. Clarke*, 30 Cal. 419; *Green v. Clark*, 31 Id. 591; *Hathaway v. Ryan*, 35 Id. 190; *Logan v. Hale*, 42 Id. 646; *Ogburn v. Connor*, 46 Id. 353; *McClusky v. Gerhauser*, 2 Nev. 47.

⁴ *Hidden v. Jordan*, 28 Cal. 301.

⁵ *Steinback v. Krone*, 36 Id. 303.

⁶ Cal. Code C. P., sec. 648, As to

time of filing exceptions to findings, and serving of notice, see Cal. Code C. P., secs. 649, 650, 651; see also *Gay v. Moss*, 34 Cal. 125.

⁷ *Hathaway v. Ryan*, 35 Cal. 188; see *Mulcahy v. Glazier*, 51 Id. 626.

⁸ *Hidden v. Jordan*, 28 Cal. 304; *Cowing v. Rogers*, 34 Id. 648; *Rico v. Inskeep*, Id. 224.

⁹ *Lucas v. San Francisco*, 28 Cal. 591; *Hidden v. Jordan*, Id. 301. As to how findings of fact may be waived, see Cal. Code C. P., sec. 634.

§ 4750. **When Necessary.**—Exceptions need not be taken where the facts found do not warrant the judgment, or where they are inconsistent with the judgment.¹ The office of exceptions to findings is to supply the want of findings where, upon any of the issues, the facts are insufficiently found, or not found at all.² A general exception to finding of mixed questions of law and fact does not raise the question whether the fact found is sustained by the evidence.³ It is not necessary to take exceptions to the findings if the appellant attacks only the conclusions of law drawn from the facts found.⁴

§ 4751. **Exceptions to Instructions—Exception must be Taken.**—Appellant can not avail himself of error in the court below in instructing the jury, or in modifying instructions asked, unless he excepts in the court below.⁵ A party can not take his chances for a verdict on instructions given or refused without exceptions taken, and then, after verdict, except to the action of the court upon motion for new trial.⁶ Exceptions must be taken at the time the decision is made, unless otherwise provided;⁷ but the bill containing the exceptions may be presented to the judge for settlement, either at the time the decision is made, or afterward, under section 650 of the California code of civil procedure. If an exception to the charge of the court to the jury is taken after the jury have withdrawn to consider of their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion of the court, and whether allowed or disallowed, the supreme court will not interfere with the exercise of this discretion.⁸ In *Robinson v. W. P. R. R. Co.*, 48 Cal. 425, the court say: “Exceptions to the oral charge ought to point out the specific portions excepted to, and be made at the time, in order that the judge may have an opportunity before the jury retires to correct any error he may have inadvertently fallen into in the hurry and perplexities of the trial.”⁹ If a bill of exceptions is presented for settlement more than thirty days after the judgment is rendered, it must show an extension of time as an excuse for delay, or the bill can not be considered by

¹ *Lucas v. San Francisco*, 28 Cal. 591.

² *Cowing v. Rogers*, 34 Cal. 648.

³ *People v. Albright*, 14 Abb. Pr. 305.

⁴ *Solomon v. Reese*, 34 Cal. 28; *Gay v. Moss*, Id. 125; *Tomlinson v. Mayor of New York*, 23 How. Pr. 452; *Rogers v. Beard*, 20 Id. 98.

⁵ *Lightner v. Menzel*, 35 Cal. 452.

⁶ *Letter v. Putney*, 7 Cal. 423.

⁷ Cal. Code C. P., secs. 646, 647.

⁸ *St. John v. Kidd*, 26 Cal. 265, Whether sec. 646, Cal. Code C. P., has changed the law in this respect, *quere*.

⁹ See also *Brown v. Kentfield*, 50 Cal. 131.

the appellate court, even if settled.¹ A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle such bill of exceptions, or if no mode is provided by law therefor, it shall be settled in such manner as the supreme court may by its order or rules direct.²

§ 4752. **Must be Specific.**—Exceptions to the charge of a court should point out the specific portions of the charge excepted to.³ A general exception to a charge to the jury will not be sustained, if any part of the charge is correct.⁴ A general exception to the whole charge will not lay ground for a review in detail.⁵ Even when taken to “each and every ruling, severally, separately, and distinctly,” it was held to amount to nothing.⁶ To an ambiguous charge, the exception must present the modification which will free it from ambiguity, or general objection will be untenable.⁶

¹ Higgins v. Mahoney, 50 Cal. 444.

² Cal. Code C. P., sec. 653.

³ Hicks v. Coleman, 25 Cal. 123;
Coleman v. Gilmore, 49 Id. 340.

⁴ Lincoln v. Clafin, 7 Wall. 132.

⁵ Magee v. Badger, 34 N. Y. 247;
Chamberlin v. Pratt, 33 Id. 47, 52.

⁶ Springstead v. Lawson, 23 How.
Pr. 302; S. C., 14 Abb. Pr. 328.

PART TENTH.

JUDGMENTS AND DECREES.

CHAPTER I.

JUDGMENT IN GENERAL.

§ 4753. **What is a Judgment.**—A judgment is the final determination of the rights of the parties in the action or proceeding.¹ Every definite sentence or decision of a court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of the appellate court.² It should distinctly express what is given or denied.³ The opinion of the judge on collateral matters is no part of the judgment;⁴ nor his reasons given in his findings.⁵

§ 4754. **Jurisdiction of Court.**—If the court has jurisdiction of the person of the defendant and the subject-matter, the judgment is good against a collateral attack, however erroneous it may be.⁶ If it appear by the record or otherwise that the court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also.⁷ A party against whom a judgment has been rendered by a court of general jurisdiction will be presumed to have been made a party to the suit in some of the ways pro-

¹ Cal. Code C. P., sec. 577.

² *Belt v. Davis*, 1 Cal. 138.

³ 14 Vin. Abr. 612; 6 Dane Abr. 90; Lawes on Pl. 669; *Whitaker v. Bramson*, 2 Paine, 209.

⁴ *Ward v. The Fashion*, 1 Newb. 41.

⁵ *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

⁶ *Moore v. Martin*, 38 Cal. 428, citing *Hahn v. Kelly*, 34 Id. 391.

⁷ *McMinn v. Whelan*, 27 Cal. 313; *Whitwell v. Barbier*, 7 Id. 54; *Forbes v. Hyde*, 31 Id. 342.

vided by law, unless the contrary appears affirmatively by the record.¹

The superior courts in California, by virtue of their organization and common-law powers, have full authority, except when limited by the constitution or practice act, to pronounce such judgment as the exigency of each case shall require.² Jurisdiction will generally be presumed in the case of superior courts; but if the want of jurisdiction appears on the face of the record of the judgment of a superior court, the judgment is void, and it may be attacked in a collateral proceeding.³ The true test is, whether the omission be of the form or of the substance of the act required to be performed. If of the substance, then the judgment is a nullity; if of form, only an irregularity.⁴ The presumption in favor of a judgment of a court of general jurisdiction is overthrown when the record of the entire case discloses a want of jurisdiction.⁵ But this presumption does not apply to judgments of inferior courts. In such case, the facts giving jurisdiction must be shown.⁶ The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.⁷ It is essential to the validity of a judgment that it be rendered by a court of competent jurisdiction at the time and place and in the form prescribed by law.⁸ A judgment does not depend upon the clerk performing his duty in making up the judgment roll, or in preserving the papers. If the facts necessary to give jurisdiction to the court exist, the judgment is good.⁹

§ 4755. **Final Judgment.**—The correct rule appears to be that the words “final judgment” must be understood as applying to all judgments and decrees which determine the particular cause, and that it is not requisite that such judgment should finally decide upon the rights which are litigated.¹⁰ So an order setting aside a former judgment is a final judgment.¹¹ Every definite sentence or decision of a court by which the merits of the case are determined is a final judgment.¹² But no question

¹ Sharp v. Daugney, 33 Cal. 505.

² Stewart v. Levy, 36 Cal. 159.

³ Forbes v. Hyde, 31 Cal. 342; affirmed in Hahn v. Kelly, 34 Id. 391; Drake v. Duvenick, 45 Id. 464; Coit v. Haven, 30 Conn. 190; see also Cal. Code C. P., sec. 1908.

⁴ Hahn v. Kelly, 34 Cal. 391.

⁵ Gray v. Hawes, 8 Cal. 569.

⁶ Rowley v. Howard, 23 Cal. 404; Jolley v. Foltz, 34 Id. 326.

⁷ Cal. Code C. P., sec. 1917.

⁸ Wicks v. Ludwig, 9 Cal. 173.

⁹ Lick v. Stockdale, 18 Cal. 219; Sharp v. Lumley, 34 Id. 611; Hutchinson v. Bours, 13 Id. 50.

¹⁰ Belt v. Davis, 1 Cal. 138; Cooley v. Patterson, 52 Me. 472; Sheldon v. Williams, 52 Barb. 183; Klink v. Steamer Cussetta, 30 Ga. 504.

¹¹ Explaining Loring v. Illsley, 1 Cal. 28; Belt v. Davis, Id. 135.

¹² Id.

must be reserved.¹ So a judgment dismissing a suit in which a temporary injunction had been granted is a final judgment.² A judgment by an equally divided court, affirming the judgment of the court below, is a determination as final as if rendered by a unanimous court.³ The judgment or decree of a court of competent jurisdiction is not only final as to the matters actually determined, but as to every other matter which the parties might have litigated and had decided under the pleadings.⁴ So a failure to plead a defense which the party was bound to present is a waiver by which the party is concluded.⁵ So when a fact is necessarily found and determined, it is final and conclusive between the parties, not only when the subject-matter is the same, but when the point comes incidentally in question in regard to a different matter.⁶ Although a judgment may be final with reference to the court that pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed.⁷

§ 4756. **Judgment must Follow Allegations and Proofs.** The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice.⁸ The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced

¹ Belmont v. Ponvert, 3 Robt. 693.

² Dowling v. Polack, 18 Cal. 625, in favor of the defendant; Leese v. Sherwood, 21 Cal. 151. Order, as contradistinguished from a final judgment: see Gilman v. Contra Costa Co., 8 Cal. 57; McKinley v. Tuttle, 34 Id. 235.

³ Durant v. Essex Co., 7 Wall. 107.

⁴ Phelan v. Gardner, 43 Cal. 311; Harris v. Harris, 36 Barb. 83; Clemens v. Clemens, 37 N. Y. 59.

⁵ Dewey v. Peck, 33 Iowa, 242; Maloney v. Horan, 49 N. Y. 115; Barwell v. Knight, 51 Barb. 267.

⁶ Gray v. Dougherty, 25 Cal. 272; Caperton v. Schmidt, 26 Id. 493; Garwood v. Garwood, 29 Id. 521. See, as to effect of a judgment, Cal. Code C. P., sec. 1908. As to what judgments are final, consult, in ejectment, Smith v. Trabue's Heirs, 9 Pet. 4; by default on promissory notes, Clements

v. Berry, 11 How. U. S. 398; in action on contract, Whitaker v. Bramson, 2 Paine, 209. The distinction between a judgment which is final and one which is definitive explained in United States v. The Peggy, 1 Cranch, 103. As to what decrees are final, and when decrees become final, consult Jenkins v. Eldredge, 1 Woodb. & M. 61; Porter v. United States, 2 Paine, 313. The distinction between decrees which are final and those which are interlocutory discussed in Chouteau v. Rice, 1 Minn. 24; see also Forgay v. Conrad, 6 How. U. S. 201; Perkins v. Fourniquet, Id. 206; Pulliam v. Christian, Id. 209; De Armas' Heirs v. United States, Id. 103.

⁷ Hills v. Sherwood, 33 Cal. 474.

⁸ Green v. Covillaud, 10 Cal. 332; Tomlinson v. Monroe, 41 Id. 96; Christian College v. Hurdley, 49 Id. 349.

within the issue.¹ So of a decree in equity.² Although the distinctions between proceedings at law and in equity have been abolished, yet it is evident that judgments at law and in equity can not be assimilated.³ But affirmative relief may be granted, though not asked for in the answer.⁴ So held in an action for the fraudulent issue of stock, and to adjust claims growing out of the frauds.⁵

§ 4757. **Joint and Several Judgment.**—Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.⁶ In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.⁷ In an action against two defendants upon a joint contract, plaintiff may have a several judgment against one defendant who has been served, even if the other defendant has not been served; nor is it vitiated as to the defendant served, by the fact that it is in form entered up against both.⁸ In an action against defendants jointly and not severally liable, where a portion only of the parties are served with process, the clerk can not, on the application of plaintiff, enter judgment upon default against parties served only. A judgment so entered is void.⁹ Where the liability is joint or several, the clerk may enter default and judgment against those served, whether all are served or not.¹⁰ The entry of judgment by the clerk is of course confined to actions arising upon contract for the recovery of money or damages only.¹¹ When a judgment has been recovered against one or more joint debtors, the others, who were not originally served and did not appear, may be summoned to show cause why they should not be bound by the

¹ Cal. Code C. P., sec. 580; *Kelsey v. Western*, 2 N. Y. 506; *Bailey v. Rider*, 10 Id. 363; *Rome Exch. Bank v. Eames*, 1 Keyes, 588; *Wright v. Delafield*, 25 N. Y. 266, reversing S. C., 23 Barb. 498; *Coleman v. Sec. Av. R. R. Co.*, 38 N. Y. 201.

² *Boone v. Chiles*, 10 Pet. 177; *Jackson v. Ashton*, 11 Id. 229.

³ *Butler v. Lee*, 3 Keyes, 76; 33 How. Pr. 251; *Towle v. Jones*, 1 Robt. 87; *Mann v. Fairchild*, 2 Keyes, 106.

⁴ California Code of Civil Procedure, sec. 666.

⁵ *N. Y. & N. H. R. R. Co v. Schuyler*, 34 N. Y. 30.

⁶ Cal. Code C. P., sec. 578.

⁷ Id., sec. 579.

⁸ *Kelly v. Bandini*, 50 Cal. 530; see also Cal. Code C. P., sec. 414.

⁹ *Kelly v. Austin*, 17 Cal. 564; *Curry v. Roundtree*, 51 Id. 184; see also *Brady v. Reynolds*, 13 Id. 31; *People v. Frisbie*, 18 Id. 402.

¹⁰ See Cal. Code C. P., secs. 414, 585, subd. 1.

¹¹ Id., sec. 585.

judgment.¹ Where there is an appearance by both defendants, judgment should be against both.² The statute authorizing the entry of judgment against the joint property of the defendants, where two or more persons, associated in any business, transact such business under a common name, by which they are sued, and one or more, but not all the associates, were served with process, has been held unconstitutional in California.³

§ 4758. **Entering Judgment.**—The clerk shall keep with the records of the court a book to be called the “judgment book,” in which judgments must be entered.⁴ It is not necessary for the clerk in entering up a judgment to insert therein recitals of his exposition of the preceding facts.⁵ The recitals in a judgment are *prima facie* evidence only of the facts.⁶ So the recital of the service of summons is conclusive of the fact.⁷ Where the supreme court reverses the judgment of a district court, and directs the entry of final judgment, such judgment can be entered by the clerk of the district court in vacation.⁸ So an action tried by the court without a jury may be entered in vacation.⁹ A judgment is not a nullity because entered before exceptions to the findings are overruled and additional findings filed.¹⁰ When a demurrer to the complaint is sustained, and the plaintiff’s application to amend his complaint is denied, it is the duty of the clerk, without any further direction, to enter the appropriate judgment.¹¹ A judgment may be amended *nunc pro tunc*, either before or after the term has expired.¹² Where after the death of the appellants the appellate court, not being aware of the death, render a judgment of affirmance, upon a subsequent suggestion of the fact the judgment will be vacated, and a judgment of affirmance rendered, as of a day previous to the death, *nunc pro tunc*.¹³ Clerical errors and misprisions may be corrected *nunc pro tunc*.¹⁴ The judgment against an administrator,

¹ Cal. Code C. P., sec. 414; Id. 989; see also *Sneath v. Griffith*, 48 Cal. 438; *Tay v. Hawley*, 39 Id. 93.

² *Flake v. Carson*, 33 Ill. 518.

³ *Tay v. Hawley*, 39 Cal. 93.

⁴ Cal. Code C. P., sec. 668.

⁵ *Leese v. Clark*, 28 Cal. 33; *Green v. Swift*, 50 Id. 455.

⁶ Id.; *Hahn v. Kelly*, 34 Cal. 391.

⁷ *Sharp v. Lumley*, 34 Cal. 611.

⁸ *McMillan v. Richards*, 12 Cal. 467.

⁹ *People v. Jones*, 20 Cal. 50; Cal. Code C. P., sec. 78. As to acts necessary, see *Casement v. Ringgold*, 28 Cal. 335.

¹⁰ *Haley v. Amestoy*, 44 Cal. 135.

¹¹ *Gallardo v. Reed*, 49 Cal. 346.

¹² *Morrison v. Dapman*, 3 Cal. 255; *Swain v. Naglee*, 19 Id. 127; *Branger v. Chevalier*, 9 Id. 172; *Hegeler v. Henckell*, 27 Id. 491; *Mountain v. Rowland*, 30 Ga. 929.

¹³ *Black v. Shaw*, 20 Cal. 68; see Cal. Code C. P., sec. 669, which provides that if a party die after verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon.

¹⁴ *Hegeler v. Henckell*, 27 Cal. 491; see *De Castro v. Richardson*, 25 Id. 49.

though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim.¹ A court may at any time render or amend a judgment *nunc pro tunc* when the record discloses that the entry on the minutes does not correctly give what was the judgment of the court.² But an alteration of a judgment by the court without notice, so as to include a party not served with process, if not void, is voidable at the election of the party.³ The court may amend the judgment by inserting a clause showing who are personally liable for the debt.⁴ The rule that a court has no power over its own judgments upon the expiration of the term has no application, except to final judgments, or while the proceedings are *in fieri*.⁵ But where a judgment is rendered, and an appeal taken to this court, the court below loses control over the judgment, and an order amending the judgment is erroneous.⁶

§ 4759. **Judgment Roll.**—An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment roll.⁷ An affidavit upon which to base a motion to strike out an answer, and notice of such motion and affidavit of its service, constitute no part of the judgment roll.⁸ A bill of exceptions made during the progress of a trial should be annexed to the judgment roll.⁹ Until the amendment to the two hundred and third section of the practice act, the judgment roll was not required to contain the order sustaining or overruling a demurrer.¹⁰ An order submitting a demurrer, where it is taken under advisement, forms no part of the judgment roll.¹¹

§ 4760. **What Constitutes.**—Immediately after entering the judgment the clerk shall attach together and file the following papers, which shall constitute the judgment roll: 1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment; 2. In all other cases the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action,

¹ Chase v. Swain, 9 Cal. 130.

² Morrison v. Dapman, 3 Cal. 255.

³ Chester v. Miller, 13 Cal. 561;
Womack v. Sanford, 37 Ala. 445.

⁴ Leviston v. Swan, 33 Cal. 480.

⁵ Hastings v. Cunningham, 35 Id.
549.

⁶ Bryan v. Berry, 8 Cal. 135.

⁷ Abbott v. Douglass, 28 Cal. 295.

⁸ Dimick v. Campbell, 31 Cal. 238.

⁹ More v. Del Valle, 28 Cal. 170.

¹⁰ Abadie v. Carrillo, 32 Cal. 172.

¹¹ Andersou v. Fisk, 36 Cal. 625.

and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision.¹ An interlocutory judgment is properly a part of the judgment roll.² If the clerk neglects to make up the judgment roll, it does not vitiate the judgment nor the proceedings under it.³

§ 4761. **Certificate to Judgment Roll.**

Form No. 1136.

[TITLE.]

I, the undersigned, county clerk of the county of, state of California, and *ex-officio* clerk of the superior court of the said state, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in judgment book of said court, at page And I further certify that the foregoing papers, hereto annexed, constitute the judgment roll in said action.

Witness my hand and the seal of said superior court, this day of, 18..

....., Clerk.

By, Deputy Clerk.

§ 4762. **Docketing Judgment.**—Immediately after filing a judgment roll, the clerk shall make the proper entries of the judgment under appropriate heads in the docket kept by him.⁴ If the judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.⁵ The docket is a book which the clerk shall keep in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered.⁶ The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment debtor to strangers to the judgment.⁷ It shall be open at all times during office hours for the inspection of the public without charge.⁸ The judgment debtor can not set up

¹ Cal. Code C. P., sec. 670.

² Packard v. Bird, 40 Cal. 382.

³ Sharp v. Lumley, 34 Cal. 611; Lick v. Stockdale, 18 Id. 219; Sharp v. Daughney, 33 Id. 505.

⁴ Cal. Code C. P., sec. 671.

⁵ Id., sec. 672.

⁶ Cal. Code C. P., sec. 672.

⁷ Page v. Rogers, 31 Cal. 293.

⁸ Cal. Code C. P., sec. 673.

errors in docketing the judgment as destroying its lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operated as a lien; if not, he has no right to complain.¹

§ 4763. **Lien of Judgment.**—From the time the judgment is docketed, it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the said lien expires.² The lien shall continue for two years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, in which case the lien of the judgment ceases.³ *Quære:* Upon affirmance of the judgment by the supreme court, and *remittitur* to the superior court, is the lien of the judgment revived or renewed, or does it exist at all? or must the judgment creditor rely solely upon his execution and upon the appeal bond? There would seem to be no question that during the pendency of the appeal the judgment debtor may alien his real estate, and the purchasers take it discharged of the lien, inasmuch as the lien ceases upon filing the proper bond; but whether a new lien is created upon docketing the judgment of the appellate court is not clear. A lien on real estate commences to run from the docketing of the judgment, unless the judgment is stayed by an order of the court, pending a motion for new trial, or a stay bond on appeal.⁴ In foreclosure cases, where there is a judgment *in personam*, and also a judgment enforcing a lien and directing a sale of the property, and the undertaking on appeal only stays the sale and provides for costs, the lien of the personal judgment on the judgment debtor's property in the county where it is docketed attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed.⁵ If the plaintiff does obtain a personal judgment, a decree enforcing the lien and directing a sale of the property does not become a judgment lien on the other property until after sale and deficiency docketed, and then only for the deficiency.⁶ A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county; and from the time of filing, the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in

¹ Low v. Adams, 6 Cal. 277.

² Cal. Code C. P., sec. 671.

³ Id.

⁴ Barroilhet v. Hathaway, 31 Cal. 395.

⁵ Englund v. Lewis, 25 Cal. 350.

⁶ Englund v. Lewis, 25 Cal. 350; Culver v. Rogers, 28 Cal. 520; Chapin v. Broder, 16 Id. 421.

such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years unless the judgment be previously satisfied.¹ The fact that a lien has existed and expired in another county makes no difference. The lien commences upon filing the transcript in the recorder's office, and continues two years.²

§ 4764. **Effect of Judgment Lien—Death of Party to Judgment.**—If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.³ The continuance of the name of a deceased plaintiff, instead of that of his executor, in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void.⁴ The death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision, or a departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death.⁵ The rule is different if the death occurs previous to the argument. In that event, further proceedings can only be had upon leave given after suggestion of the death is made.⁶

§ 4765. **Equitable Liens.**—The lien of a judgment against the holder of the legal estate is postponed in equity to an equitable right previously acquired.⁷ Where a creditor has obtained judgment, and caused execution to be delivered to the sheriff, and the same has been returned unsatisfied for the want of property, he does not acquire any lien by a bill in equity to discover assets upon his debtor's property.⁸ Where judgment and decrees in equity of state courts are by state laws liens upon land, decrees in admiralty of United States courts have the same character, and are equally binding.⁹

§ 4766. **Extension of Lien.**—The issuing and levying of an execution before the lien of the judgment upon which the execution issued expires will not operate to prolong the lien of the judgment beyond the time limited in section 204 of the

¹ Cal. Code C. P., sec. 674.

² Downer v. Palmer, 23 Cal. 45. As to recording, etc., see Civil Code, secs. 1159, 1165, 1169, 1170.

³ Cal. Code C. P., sec. 669.

⁴ Gregory v. Haynes, 21 Cal. 443; Stetzell v. Fullerton, 44 Ill. 108.

⁵ Black v. Shaw, 20 Cal. 68.

⁶ Black v. Shaw, 20 Cal. 68.

⁷ Brown v. Pierce, 7 Wall. 205. In what cases are judgments and decrees of United States courts liens upon real estate, see Ward v. Chamberlain, 2 Black, 430.

⁸ Chase v. Searles, 45 N. H. 511.

⁹ Ward v. Chamberlain, 2 Black, 430.

code.¹ It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified.²

§ 4767. **Property Subject to the Lien.**—The lien of a judgment is purely the creature of statute; and when the statute says “property exempt from execution,” it means property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court.³

§ 4768. **Release of Lien.**—The payment by a judgment debtor of the judgment, after a sheriff’s sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff’s deed, instead of a certificate of redemption, can not divest the lien of a subsequent judgment.⁴ The perfecting an appeal does not release the lien acquired by docketing the judgment.⁵ But if the enforcement of the judgment be stayed on appeal by a sufficient undertaking as provided in the code, the lien ceases.⁶

§ 4769. **Gold-coin Judgment.**—In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.⁷ If the contract be to pay in gold and silver coin, the judgment must not be for gold coin only.⁸ The allegation that a contract was payable in a specified kind of money is an allegation of a material fact, and may be traversed.⁹ A contract that if the obligation is not paid in gold coin, the debtor will pay the difference between the value of gold and currency, is not a contract of which specific performance in gold coin can be decreed.¹⁰ Upon an accounting, a promise in writing by the defendant to pay the sum found due

¹ Isaac v. Swift, 10 Cal. 71.

² Id.

³ Ackley v. Chamberlain, 16 Cal. 181; Bowman v. Norton, Id. 213.

⁴ McCarty v. Christie, 13 Cal. 79.

⁵ Low v. Adams, 6 Cal. 277.

⁶ Cal. Code C. P., sec. 671.

⁷ Cal. Code C. P., sec. 667.

⁸ Burnett v. Stearns, 33 Cal. 469.

⁹ Wallace v. Eldridge (No. 2), 27 Cal. 499.

¹⁰ Lane v. Gluckauf, 28 Cal. 289; see, as to bill of exchange payable in gold coin, Bank of Prince E. I. v. Trumbull, 53 Barb. 459.

in gold coin justifies a judgment in gold coin.¹ In an action to recover possession of personal property, the plaintiff may recover its value in United States legal-tender notes.² One unlawfully converting property does not sustain any injury, if the jury, in an action to recover possession of the same, find its value in United States legal-tender notes.³

§ 4770. **Costs and Interest in Gold Coin.**—Where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interest in the kind of money mentioned in the contract.⁴ But it is error for the court to adjudge the costs in an action for forcible entry and detainer to be paid in gold coin.⁵

§ 4771. **Ejectment.**—In ejectment, if the court finds the value of the use and occupation of the premises in both gold and currency, a general judgment may be rendered for the currency value.⁶ As a matter of law, there is no possible difference in value between gold coin and legal-tender notes, nor can evidence be received to prove a difference.⁷ Where the kind of money received by the defendant is not in issue, and he has received the same in a fiduciary capacity, or to the use of another, it is proper for the court, upon a verdict for the amount of money, to order judgment in the kind of money received by him.⁸

§ 4772. **Goods Sold.**—If the complaint avers a contract in writing by defendant, to pay for goods sold in gold coin, made before the sale, and such contract is made after suit commenced, but dated before the sale, judgment should be for gold coin.⁹

§ 4773. **Dismissal of Action—Nonsuit.**—An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter-claim has not been made, or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon. 2. By either party, upon the written consent of the other. 3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. 4. By the court, when

¹ Carey v. P. & C. Petroleum Co., 33 Cal. 695.

² Tarpey v. Shepherd, 30 Cal. 180.

³ Id.

⁴ Carpentier v. Atherton, 25 Cal. 569.

⁵ More v. Del Valle, 28 Cal. 170.

⁶ Carpentier v. Small, 35 Cal. 346.

⁷ Id.; Poett v. Stearns, 31 Cal. 78.

⁸ Pinkerton v. Woodward, 33 Cal.

557.

⁹ Meyer v. Kohn, 29 Cal. 278.

upon the trial, and before the final submission of the case, the plaintiff abandons it. 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.¹ A party can not be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief, either at law or in equity. If, then, upon the facts stated in his complaint the plaintiff would have been entitled to relief in equity under the old system of practice, the action can not be dismissed.²

§ 4774. **A Dismissal** of an action by a stipulation signed by both parties, which provides that each party shall pay his own costs, is such a determination of the action in favor of the defendant as will enable him to maintain an action for malicious prosecution.³ Allowing an action to rest without service of summons for two years and eight months after the summons is issued is such a want of diligence as to justify the court in dismissing the action.⁴

§ 4775. **By Consent.**—After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the court any authority to enter an order of dismissal, without the consent of the defendant.⁵

§ 4776. **By the Court.**—Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not.⁶ When the plaintiff closes his evidence, if the court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted.⁷ In deciding whether the plaintiff has made a sufficient case, the cross-examination as well as the examination is to be consid-

¹ Cal. Code C. P., sec. 581, as amended 1878.

² Grain v. Aldrich, 38 Cal. 514; Peters v. Foss, 20 Id. 587; People v. Loewy, 29 Id. 264.

³ Kinsey v. Wallace, 36 Cal. 463.

⁴ Grigsby v. Napa County, 36 Cal. 585.

⁵ Heinlin v. Castro, 22 Cal. 100.

⁶ Valentine v. Stewart, 15 Cal. 387. As to the power of court in compul-

sory nonsuits, see Ringgold v. Haven, 1 Id. 108; Mateer v. Brown, Id. 221; Silsby v. Foote, 14 How. U. S. 218; Castle v. Bullard, 23 Id. 172; Folger v. The Robert G. Shaw, 2 Woodb. & M. 531; Thompson v. Campbell, Hempst. 8; Hyde v. Barker, Burn. (Wis.) 148; compare Linthicum v. Remington, 5 Cranch C. C. 546.

⁷ Ensminger v. McIntire, 23 Cal. 593; Geary v. Simmons, 39 Id. 232.

ered.¹ On defendant's motion for a nonsuit, the court will permit the plaintiff to supply the defect if he can do so.²

§ 4777. **By Plaintiff.**—Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter-claim.³ So in ejectment. Nor, under section 148 of the California practice act, is he bound to tender costs before the nonsuit.⁴ But the plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted, and the jury has retired; but such right does not exist at any time before such final submission and retirement.⁵ In ejectment, the plaintiff may, at any time before trial, dismiss the action as to some of the defendants, and proceed against the others alone.⁶ If one of several defendants in ejectment answers, and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others.⁷ In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others.⁸ If the defendant sets up a counter-claim asking for affirmative relief, the plaintiff can not, before trial, have a dismissal of his own motion.⁹

§ 4778. **Dismissal, Effect of.**—A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action.¹⁰ If an action is improperly dismissed by the plaintiff, defendant's remedy is by appeal from the judgment, and not by motion to set it aside.¹¹

¹ Masten v. Griffing, 33 Cal. 116.

² Gardiner v. Schmaelzle, 47 Cal. 588; Abbey Homestead v. Willard, 48 Id. 617. As to nonsuit in an action for negligence, see Watson v. S. F. etc. Co., 50 Cal. 523.

³ Hancock Ditch Co. v. Bradford, 13 Cal. 637.

⁴ California Code of C. P., sec. 581, subd. 1; Dimick v. Deringer, 32 Cal. 488; Stewart v. Gray, Hempst. 94; see Gordon v. Goodell, 34 Ill. 429; Folger v. The Robert G. Shaw, 2 Woodb. & M. 531; Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46; Tobey v. Chaf- lin, 3 Sumn. 379.

⁵ Brown v. Harter, 18 Cal. 76; Sanders v. Sanders, 24 Ind. 133.

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⁶ Reed v. Calderwood, 22 Cal. 464.

⁷ Dimick v. Deringer, 32 Cal. 488.

⁸ People v. Evans, 29 Cal. 429.

⁹ Thompson v. Spray, 3 West Coast Rep. 433; Robinson v. Placerville etc. R. R. Co., Id. 23.

¹⁰ Leese v. Sherwood, 21 Cal. 151; Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46; Amis v. Smith, 16 Id. 303; Jay v. Almy, 1 Woodb. & M. 262; Bla. Com. 295; Episcopal etc. Society v. Episcopal Church etc., 1 Pick. 371; 2 Mass. 113; Homer v. Brown, 16 How. U. S. 354.

¹¹ Higgins v. Mahoney, 50 Cal. 444.

§ 4779. **Ejectment.**—In ejectment, upon disclaimer of possession or interest in the property, a judgment for the plaintiff can not be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit.¹ When the evidence, and the presumption reasonably arising therefrom, tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury.² A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint.³ It will not be granted where there is some evidence tending to show prior possession.⁴ It is error to refuse in an action of ejectment a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action.⁵

§ 4780. **Judgment on Nonsuit.**—A judgment on nonsuit must not be entered as a judgment on the merits, for the reason that the defendant might proceed with his own case, and obtain judgment on the merits, and by moving for a nonsuit he waives this right.⁶

§ 4781. **Motion.**—A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.⁷ Where it is made without stating the grounds, it is not error to overrule it.⁸ Defendant will not be allowed to raise new points afterwards in the supreme court.⁹ If the grounds of the motion do not appear of record, the supreme court will not consider it.¹⁰

§ 4782. **When and when not Granted.**—Nonsuit is not proper where there is any evidence tending to prove the indebtedness.¹¹ If the evidence of the plaintiff would not authorize a jury to find a verdict for him, or if the court would set it aside if so found as contrary to evidence, it is the duty of the court to nonsuit the plaintiff.¹² So if he fails to offer any evidence.¹³ A plaintiff should not be nonsuited for the non-payment of the costs of two former suits for the same cause of action.¹⁴

¹ Noe v. Card, 14 Cal. 576; Pioche v. Paul, 22 Id. 106.

² De Ro v. Cordes, 4 Cal. 117.

³ McKee v. Greene, 31 Cal. 418.

⁴ Sharon v. Davidson, 4 Nev. 416.

⁵ Garner v. Marshall, 9 Cal. 268.

⁶ Wood v. Raymond, 42 Cal. 645.

⁷ People v. Banvard, 27 Cal. 474.

⁸ Kiler v. Kimbal, 10 Cal. 267.

⁹ Raimond v. Eldridge, 43 Cal. 506; Johnson v. Moss, 45 Id. 518.

¹⁰ Poehlman v. Kennedy, 48 Cal. 201.

¹¹ Cravens v. Dewey, 13 Cal. 40; Williams v. Norton, 3 Kan. 295.

¹² Mateer v. Brown, 1 Cal. 221.

¹³ Kohler v. Wells, Fargo & Co., 26 Cal. 607; Langhoff v. Milwaukee etc. R. R., 19 Wis. 489.

¹⁴ Janeway v. Skerritt, 1 Vroom (N. J.), 97.

§ 4783. Judgment by Default—Entry of Default by Clerk.

Form No. 1157.

In this action, the defendant, C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant, C. D., in the premises is hereby duly entered according to law.

Attest my hand, and the seal of said court, this.....day of, 18..

[SEAL.]

[SIGNATURE.]

§ 4784. Clerk's Duty.—The entry of a default in a case authorized by law is a ministerial act to be performed by the clerk, and the disqualification of the judge of the court to try the cause does not disqualify the clerk for the performance of this duty.¹ When the law declares what the judgment shall be, a judgment on default is not the judgment of the clerk.² The clerk derives all his power in entering a default without an order of the court from the statute, and when he enters a default, it must appear that all the facts existed which the law requires to authorize it.³

§ 4785. Default, What Admits and Cures.—A default admits only the facts alleged in the complaint.⁴ So where title as administrator is averred.⁵ So of title in ejectment.⁶ A default on a complaint containing special counts defectively stated, and also the common counts in *assumpsit* properly stated, will support a judgment—the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint.⁷ A default cures a defective allegation of fact, but not an entire absence of any allegation.⁸

§ 4786. Order of Court Required.—Where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the court to enter a default and judgment upon overruling the demurrer.⁹ If an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it can not then strike the answer of the defendant and enter his default,

¹ *People v. De Carrillo*, 35 Cal. 37.

⁶ *Smith v. Billett*, 15 Cal. 23.

² *Harding v. Cowing*, 28 Cal. 212.

⁷ *Hunt v. City of San Francisco*, 11

³ *Providence Tool Co. v. Prader*, 32 Cal. 250.

⁴ *Harlan v. Smith*, 6 Cal. 173; *McGregor v. Shaw*, 11 Id. 47.

⁸ *Hentsch v. Porter*, 10 Cal. 555;

Barron v. Frink, 30 Id. 489.

⁵ *Curtis v. Herrick*, 14 Cal. 117.

⁹ *Seale v. McLaughlin*, 28 Cal.

668.

and render judgment for plaintiff for the amount claimed in the complaint.¹

§ 4787. Judgment by Default.

Form No. 1138.

[TITLE.]

In this action the defendant C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint herein, and the legal time for answering having expired, and the default of the said defendant in the premises having been duly entered according to law: now, at this day, on application of E. F., attorney for said plaintiff:

It is ordered that judgment be entered herein against the said defendant C. D., as well as against the defendant E. D., not served with process, in accordance with the prayer of said plaintiff's complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered and adjudged that A. B., plaintiff, do have and recover of and from the said defendants, C. D. and E. D., the sum of dollars, with interest thereon, at the rate of per cent per month, from the date hereof until paid; together with said plaintiff's costs and disbursements incurred in said action, amounting to the sum of dollars.

And it is further ordered and adjudged that said plaintiff do have execution against the separate property of the defendant C. D., as well as against the joint property of all the said defendants.

Judgment rendered on the day of, 18..

§ 4788. Against Whom Entered.—A judgment by default may as well be taken against an administrator as any other party,² also against a municipal corporation as well as against a private person.³ Where the action is against defendants severally liable, a portion only being served with process, the clerk can, on application of plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint.⁴ But otherwise if they are jointly liable.⁵ If persons are served with summons who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default.⁶

§ 4789. Effect of.—Where the summons has been duly served, a judgment by default amounts to a confession on the

¹ Abbott v. Douglass, 28 Cal. 295.

² Chase v. Swain, 9 Cal. 130.

³ Hunt v. City of San Francisco, 11 Cal. 250.

⁴ Kelly v. Van Austin, 17 Cal. 564

⁵ Id.

⁶ Lamping v. Hyatt, 27 Cal. 102.

part of the defendants of all the material facts in the complaint.¹ The fact that one defendant who suffered judgment by default is not estopped as to an issue made by the other defendants, upon which they succeeded, does not prevent the judgment upon this issue from being an estoppel between the plaintiff and the defendants who pleaded it.² In an action upon a joint contract, if one be defaulted and the other go to trial on a plea that is peculiar to himself, a judgment in his favor will not discharge the defaulted defendant; otherwise if the matter pleaded be a defense common to both defendants.³

§ 4790. **Entry of.**—The clerk of a court, in entering a judgment after default, acts in a mere ministerial capacity, and can not render a judgment granting any relief beyond that warranted by the facts stated in the complaint.⁴ A judgment entered by the clerk, upon default, for a sum greater than is demanded in the prayer of the complaint and specified in the summons, is not void, but is simply erroneous, and may be enforced until modified on motion or on appeal.⁵

§ 4791. **Errors, how Reviewed.**—There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former as well as the latter case the error may be corrected on appeal.⁶ Judgment by default before the expiration of the full time will be reversed on appeal.⁷ If the summons be radically defective, it will not support a judgment by default.⁸ So where the record shows that the defendant has not been legally served with process.⁹ A notice in summons that a money judgment would be taken will not support a judgment for fraud.¹⁰ Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer.¹¹ A judgment rendered upon a complaint radically defective may be treated as a nullity.¹²

§ 4792. **Proof, when Required.**¹³—A judgment in ejectment awarding damages rendered on a default will not be reversed

¹ *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

² *Jackson v. Lodge*, 36 Cal. 28.

³ *Swanzey v. Parker*, 50 Pa. St. 441.

⁴ *Gray v. Palmer*, 28 Cal. 416; *Wallace v. Eldredge* (No. 1), 27 Id. 495; *Kelly v. Van Austin*, 17 Id. 564; *Willson v. Cleaveland*, 30 Id. 192; *Leese v. Clark*, 28 Id. 26.

⁵ *Bond v. Pacheco*, 30 Cal. 531.

⁶ *Stevens v. Ross*, 1 Cal. 94.

⁷ *Burt v. Scrantom*, 1 Cal. 416.

⁸ *People v. Woodruff*, 2 Cal. 242.

⁹ *Joyce v. Joyce*, 5 Cal. 449.

¹⁰ *Porter v. Hermann*, 8 Cal. 619.

¹¹ *Abbe v. Marr*, 14 Cal. 210.

¹² *Reynolds v. Harris*, 9 Cal. 338.

¹³ See *Tuolumne Redemption Co. v. Patterson*, 18 Cal. 416; *Lick v. Stockdale*, Id. 219. See subdivisions 2 and 3 of section 585, Cal. Code C. P.

because it does not appear that the court examined witnesses upon the question of damages.¹

§ 4793. **Relief Granted.**—If judgment is rendered in favor of plaintiff by default, the court can not grant any greater relief than is demanded in the prayer of the complaint and specified in the summons.² If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer nor summons mention the rate of interest, the clerk should not render judgment for a rate greater than ten per cent per annum.³ Interest is to be allowed on cash advances as a matter of law.⁴ In an action in Massachusetts on a note made payable in New York, interest at the legal rate of the former state only will be allowed.⁵

§ 4794. **Waiver of Default.**—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default.⁶

§ 4795. **When to be Entered.**—If no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, in an action arising upon contract for the recovery of money or damages only, the clerk upon application of the plaintiff shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant. In other actions, the clerk shall enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. Where the service of the summons was by publication, the plaintiff upon the expiration of the time designated in the order of publication may, upon proof of the publication and that no answer has been filed, apply for judgment; but proof of the demand in such case shall be required.⁷

§ 4796. **Setting Aside Judgment, Grounds of.**—A party against whom an unjust judgment has been obtained through accident, mistake, or fraud, may, after the adjournment of the

¹ Dimick v. Campbell, 31 Cal. 238.

² Cal. Code C. P., sec. 580; Lamp-
ing v. Hyatt, 27 Cal. 102; Gage v.
Rogers, 20 Id. 91; Lattimer v. Ryan,
Id. 628.

³ Lamping v. Hyatt, 27 Cal. 102;
Gautier v. English, 29 Id. 165; Cal.
Civil Code, sec. 1917.

⁴ Field v. Burnam, 3 Bush, 518.
As to interest generally, as a part of
the relief granted, see Skillman v.

Lachman, 23 Cal. 199; Estate of
Isaacs, 30 Id. 105; Bibend v. Lon-
don etc. Insurance Co., Id. 78; Dunne
v. Mastick, 50 Id. 247; Brady v. Wil-
coxson, 44 Id. 245; Goldsmith v.
Sawyer, 46 Id. 213; Lander v. Castro,
43 Id. 498; also Cal. Civil Code, secs.
1916, 1917, 3287.

⁵ Ayer v. Tilden, 15 Gray, 178.

⁶ Hestres v. Clements, 21 Cal. 425.

⁷ Cal. Code C. P., sec. 585.

term at which judgment was rendered, and where no want of diligence is imputable to him in seeking relief, maintain an equitable action to set aside the judgment.¹ In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud, etc.² Insufficient grounds.³ If a judgment is erroneous, the defendant has his remedy by appeal; if void upon its face, he has in addition his remedy by motion, at any time, in the court by which the judgment was rendered.⁴

§ 4797. **Jurisdiction.**—All courts having chancery jurisdiction have power to set aside a judgment improperly obtained.⁵ A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise.⁶ The assistance of equity to set aside a judgment can not be invoked in a distinct action, so long as the remedy by motion in the original case exists.⁷

§ 4798. **Motion, when to be Made.**—At common law, after the adjournment of the term, the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time; but in most states there are special statutes fixing the time within which a motion to set aside a judgment must be made. In California, where the party has failed to apply for relief during the term, relief may be granted in vacation within a reasonable time, not exceeding six months after the close of the term.⁸ If the summons has not been personally served on the defendant, he may be allowed, on such terms as may be just, to answer to the merits of the action at any time within one year after the rendition of the judgment.⁹ During the term at which a judgment was rendered, a district court may perhaps, even without a statement or affidavits, upon motion of a party injured, amend or set aside an erroneous judgment; but to continue full and complete jurisdiction in the court over the case beyond the term, some order must be made or proceedings taken in accordance with statute.¹⁰ In New York, two years is allowed for opening up a judgment, and no more.¹¹ But not a limitation where summons was not served.¹²

¹ *Bibend v. Kreutz*, 20 Cal. 109.

² *Robb v. Robb*, 6 Cal. 21.

³ See *Markley v. Rand*, 12 Cal. 275; *Alderson v. Bell*, 9 Id. 315.

⁴ *Chipman v. Bowman*, 14 Cal. 157; *Logan v. Hillegass*, 16 Id. 200; *Bell v. Thompson*, 19 Id. 706; *Sanchez v. Carriaga*, 31 Id. 170; cited in *Murdock v. De Vries*, 37 Id. 527.

⁵ *The People v. Lafarge*, 3 Cal. 130.

⁶ *Carpentier v. Hart*, 5 Cal. 406.

⁷ *Bibend v. Kreutz*, 20 Cal. 109.

⁸ Cal. Code C. P., sec. 473.

⁹ Id.

¹⁰ *State v. First Nat. Bank*, 4 Nev. 358.

¹¹ *Hendricks v. Carpenter*, 2 Robt. 625.

¹² *Weeks v. Merritt*, 5 Robt. 610.

§ 4799. **Parties not Concluded by the Record.**—In a direct proceeding in the same action to set aside a judgment, under section sixty-eight of the practice act, the parties are not concluded by the record in any respect; on the contrary, they are allowed to show the true facts of the case by any competent evidence; *aliter*, if the question had arisen collaterally.¹

§ 4800. **Notice of Motion to Set Aside a Judgment by Default.**

Form No. 1139.

[TITLE.]

[ADDRESS.]

Take notice, that upon the affidavit, a copy of which is herewith served, I will move said court, at the city hall [or other place, designating it], on the day of, 18. . ., at the hour of o'clock A. M. of said day, or as soon thereafter as counsel can be heard, that the judgment entered by default against the defendant in this action, and all subsequent proceedings therein, be set aside, for the reasons following [state reasons in full].

[DATE.]

[SIGNATURE.]

§ 4801. **Answer to the Merits.**—The better practice is to prepare and exhibit to the court the defendant's answer at the hearing of a motion to set aside a default.² A copy of the answer should be served with the notice of motion. Where the merits are shown by affidavit, counter-affidavits on that question will not be heard.³

§ 4802. **Discretion of Court.**—The granting or refusing a motion to set aside a default based upon affidavits is a matter within the proper discretion of the court, and unless that discretion has been abused the appellate courts will not interfere.⁴ Although an order of the court below setting aside or refusing to set aside a judgment by default rests much in the discretion of the court, and will not be disturbed by the appellate court unless plainly erroneous, yet the discretion of the court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity with the law.⁵

§ 4803. **Motion, when to be Made.**—A motion may be made to set aside a default entered by the clerk, at any time before final judgment is rendered in the action, notwithstanding the court had adjourned for the term at which the default was entered, before the motion is made to vacate it.⁶

¹ McKinley v. Tuttle, 34 Cal. 235.

Howe v. Independence etc. Co., 29 Id. 72.

² Bailey v. Taaffe, 29 Cal. 422.

³ Gracier v. Weir, 45 Cal. 54.

⁵ Bailey v. Taaffe, 29 Cal. 422.

⁴ Woodward v. Backus, 20 Cal. 137;
Roland v. Kreyenhagen, 18 Id. 455;

⁶ Willson v. Cleaveland, 30 Cal.

192.

§ 4804. **Motion will be Refused.**—A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town.¹

§ 4805. **On Terms.**—The court may, upon such terms as may be just, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. An order to release a party from a judgment taken against him by default, under the sixty-eighth section of the practice act, code of civil procedure, section 473, should only be granted upon the terms, as a condition precedent, of payment of all costs accruing to the adverse party to the time of service and filing of notice of motion thereof.² Where a motion to set aside judgment is granted “on payment of all costs,” the judgment remains in force until the costs are paid.³

§ 4806. **Affidavit to Set Aside Judgment by Default.**

Form No. 1140.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. The summons and complaint in this action were served on me on the day of, 18..

III. Through mistake [inadvertence, surprise, or neglect, as the case may be] of [state the circumstances], I was prevented from appearing and answering this action.

IV. I further say that I have fully and fairly stated the case in this cause to G. H., my counsel, who resides at No., street, in the city of, and after such statement I am advised by him that I have a good and substantial defense on the merits of the action, and verily believe the same to be true.

[JURAT.]

[SIGNATURE.]

§ 4807. **By Whom Made.**—An affidavit on a motion to set aside a default should be made by the defendant, unless good reason exists for having it made by some one else.⁴ A

¹ Bailey v. Taaffe, 29 Cal. 422; see also People v. O'Connell, 23 Id. 282; and Parrott v. Den, 34 Id. 79; Haight v. Green, 19 Id. 113.

² Howe v. Independence etc. Co., 29 Cal. 72; Bailey v. Taaffe, Id. 422; Leet v. Grants, 36 Id. 288.

³ Gregory v. Haynes, 21 Cal. 443; Hartman v. Olvera, 49 Id. 101.

⁴ Bailey v. Taaffe, 29 Cal. 422. As to when it may be made by purchaser under decree, see Boggs v. Hargrave, 16 Id. 559.

motion to set aside a judgment and for leave to answer will be overruled if there is no affidavit of merits.¹ An affidavit of defense, filed upon a motion to set aside a default, should set forth the facts relied upon, so that the court can judge of the merits of the defense.²

§ 4808. **Diligence must be Shown.**—A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the court for the relief contemplated, or his right to relief will be lost. An unexplained delay of seven years in making the application will justify the court in refusing to enforce the stipulation.³

§ 4809. **Form of Affidavit.**—An affidavit on motion to vacate a judgment by default, under the sixty-eighth section of the practice act, must show: 1. That the default occurred through mistake, inadvertence, surprise, or excusable neglect; and 2. That the defendant has a meritorious defense.⁴ An affidavit by the defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default.⁵

§ 4810. **Judgment by the Court.**

Form No. 1141.

[TITLE.]

This cause came on regularly for trial on the day of, 18.., E. F., esq., appearing as counsel for the plaintiff, and G. H., esq., for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury, whereupon J. K. and L. M. were examined as witnesses on the part of the plaintiff, and N. O. and P. Q. were examined as witnesses on the part of the defendant, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

¹ Parrott v. Den, 34 Cal. 79.

² Florez v. Uhrig's Adm'r, 35 Mo. 517.

³ Reese v. Mahoney, 21 Cal. 305. As to diligence generally, see People v. Frisbie, 26 Id. 135; Lewis v. Rigney, 21 Id. 268.

⁴ Bailey v. Taaffe, 29 Cal. 422.

⁵ Elliott v. Shaw, 16 Cal. 377. As to insufficiency of affidavit, consult Bailey v. Taaffe, 29 Id. 422; People v. Rains, 23 Id. 128; Elliott v. Shaw, 16 Id. 377; People v. Lafarge, 3 Id. 130.

Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that A. B., the plaintiff, do have and recover of and from C. D., the defendant, the sum of dollars, with interest thereon at the rate of per cent per month, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of dollars; and that said sum of dollars and said interest be paid by said defendant in gold coin of the United States.

Judgment rendered....., 18..

§ 4811. **Conclusiveness of Judgment.**—A judgment is of no force except between the parties and privies,¹ except in some cases for specific purposes.² One in possession of land, who is neither a party nor a privy to a judgment for "the recovery of possession of it, is neither affected by the judgment as an instrument of evidence, nor can be dispossessed by virtue of a writ issued upon it."³ On a trial by the court it may and should decide the whole case.⁴

§ 4812. **In Equity.**—The court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.⁵ Where a decision is made in a suit in equity upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, should be provided for.⁶ Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process and not originally included in the judgment.⁷ An infant defendant is as much bound by the decree in equity as a person of full age.⁸ And it is questionable under our practice whether he is entitled to have a day given in the judgment to show cause against it.⁹ But the probate of a will is not conclusive on an infant or person of unsound mind until one year after their respective disabilities are removed.¹⁰

§ 4813. **In Partition.**—A judgment in an action for partition is binding and conclusive, as to title, upon all the parties who are served with summons or appear, and a bar to a new action.¹¹ But such judgment and partition shall not affect tenants for

¹ Beckett v. Selover, 7 Cal. 228.

² Gregory v. Haynes, 13 Cal. 591; see also Davidson v. Dallis, 8 Id. 227. Kittridge v. Stevens, 16 Id. 381.

³ Le Roy v. Rogers, 30 Cal. 229.

⁴ 1 Bosw. 281; Van Valen v. Lap- ham, 13 How. Pr. 246.

⁵ Cal. Code C. P., sec. 578.

⁶ McPherson v. Parker, 30 Cal. 455.

⁷ Chester v. Miller, 13 Cal. 558.

⁸ Joyce v. McAvoy, 31 Cal. 273.

⁹ Id.; Cal. Civil Code, secs. 41, 42.

¹⁰ Cal. Code C. P., sec. 1333.

¹¹ Morenhout v. Higuera, 32 Cal. 289.

years less than ten, to the whole of the property which is the subject of the partition.¹ The effect of a judgment in partition is to be determined by our statute, and not by the common law.² The order of a court for a partition of lands, or for a sale, in case a partition can not properly be made, is not a final judgment, in an action for partition. They are to be succeeded by a judgment confirming the partition sale.³

§ 4814. **Replevin.**—In replevin, a judgment for the plaintiff, in order to hold the sureties on the undertaking, must be in the alternative,⁴ and must determine the controversy as to the whole property in dispute.⁵

§ 4815. **On the Merits.**—In California, in cases other than those mentioned in section 581 of the Political Code, judgment is rendered on the merits.⁶ Where an answer is filed, the court may grant any relief consistent with the case made by the complaint, and embraced within the issue.⁷

§ 4816. **On Report of Referee.**—A *mandamus* lies to compel the judge of a district court to enter judgment on the report of a referee.⁸ A judgment on the report of a referee must be construed by the report.⁹

§ 4817. **Decree of Divorce.**

Form No. 1142.

[TITLE.]

This cause having been brought on to be heard this day of, 18 . . ., upon the complaint of the plaintiff above named, and the answer and cross-complaint of the defendant above named, and upon the proofs taken in said action, and upon the report of L. M., the court commissioner of this court and referee in this cause, to whom it was referred to take proofs of the facts set forth in the complaint and answer and cross-complaint respectively, and to report the same to the court, and the said referee having taken the testimony by written questions and answers, and reported the same to the court, from which it appears that none of the material allegations of the complaint, except those expressly admitted in the answer, are sustained by testimony, and that all the material averments of the answer and cross-complaint are sustained by testimony free from all legal

¹ Cal. Code C. P., sec. 767.

² *Morenhout v. Higuera*, 32 Cal. 289.

³ *Hastings v. Cunningham*, 35 Cal. 549.

⁴ See Cal. Code C. P., secs. 514, 627, 667; *Nickerson v. Chatterton*, 7 Cal. 568; *O'Connor v. Blake*, 29 Id. 312.

⁵ *Muller v. Jewett*, 4 West Coast Rep. 638.

⁶ Cal. Code C. P., sec. 582.

⁷ Cal. Code C. P., sec. 580. The provisions of this section apply to *mandamus* and *quo warranto*: *People v. Board of Supervisors San Francisco Co.*, 27 Cal. 655.

⁸ *Russell v. Elliott*, 2 Cal. 245.

⁹ *Mason v. Ring*, 2 Abb. Pr., N. S., 322; *Commercial Bank of Albany v. Ten Eyck*, 50 Barb. 9.

exceptions as to its competency, admissibility, and sufficiency; that said matter so alleged and proved in behalf of defendant are sufficient in law to entitle the defendant to the relief prayed for in his answer and cross-complaint; that plaintiff was a resident of this city and county at the time of commencing this suit, and that both plaintiff and defendant were residents of this state for a period of six months immediately prior thereto—on motion of G. H., counsel for the defendant, it is ordered, adjudged, and decreed that the court, by virtue of the power and authority therein vested, and in pursuance of the statute in such case made and provided, does order, adjudge, and decree that the marriage between the said plaintiff A. B. and the said defendant C. D. be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony, and all the obligations thereof; and it is further ordered, adjudged, and decreed that the defendant C. D. have, and he is hereby awarded, the sole charge, control, and custody of R. S. and T. U., the children, issue of said marriage, and mentioned in said answer and cross-complaint, and that the said plaintiff surrender the said children to the said defendant.

§ 4818. Decree of Foreclosure and Sale.

Form No. 1143.

[TITLE.]

I. This cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the defendant C. D. (whose default for not answering thereto has been duly entered), and upon the answers filed thereto by the defendants A. D. and E. P., and upon due proof of the filing of notice of the pendency of this action, containing the names of the parties to and the object of the action, and a description of the property affected thereby, upon the day of, 18.. [the time of filing said complaint], in the office of the county recorder of the county of, where said property is situated, and recording the same in said recorder's office, and upon the report of R. S., court commissioner of this court, which report is filed herein and is hereby confirmed, and the court having heard the proofs necessary to enable it to render judgment herein; and it appearing to the court from said report that there is now due to the plaintiff, from the said defendant C. D., for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of dollars, which sum is to draw and bear interest from the date hereof at the rate of per cent per month [or annum], and

that all the allegations in the said plaintiff's complaint contained are true—now, on motion of E. F., of counsel for the plaintiff:

II. It is adjudged and decreed, that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest, and costs in the suit and expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the sheriff of the city and county of, where said mortgaged premises are situate; that said sale be made in said city and county; that the said sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff or any of the parties to this suit may become the purchaser at such sale; and that the said sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale.

III. That the said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or his attorney, out of said proceeds, his costs in this suit, taxed at dollars, and the sum of dollars, fixed by said mortgage and allowed by the court as counsel fee of foreclosure, with interest thereon from this date, at the rate of per cent per month [or annum], and also the amount so found due as aforesaid to either, with interest thereon at the rate of per cent per month [or annum], from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

IV. That the defendant, and all persons claiming or to claim from or under him, and all persons having liens subsequent to said mortgage, by judgment or decree, upon the land described in said mortgage, and or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said sheriff's deed.

V. And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the sheriff's deed for such premises, or any part thereof.

VI. And it is further adjudged and decreed that if the moneys arising from the said sale shall be sufficient to pay the amount so found due to the plaintiff as above stated, with the interest and costs and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due the plaintiff in his return of said sale, and that, on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendant C. D., and that the defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of per cent per month [or annum], from the date of said last-mentioned return and judgment; and that the plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage referred to, or from the complaint filed in this action, are as follows, to wit [describe it].

R. Q.,

Superior Judge.

§ 4819. **Decree must Contain.**—All that a decree in a suit to foreclose a mortgage should contain is a statement of the amount due to the plaintiffs, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of sale, the costs of the action, and the debt. Nothing further is required.¹ The decree concludes the rights of all parties to the action.²

¹ *Leviston v. Swan*, 33 Cal. 480. As to the substance of a decree of foreclosure, consult *Raun v. Reynolds*, 11 Id. 14; *Taggart v. San Antonio etc. Co.*, 18 Id. 460; *Boggs v. Hargrave*, 16 Id. 559; *Pechaud v. Riquet*, 21 Id. 76; *San Francisco v. Lawton*, Id. 589; and the early cases of *Moore v. Reynolds*, 1 Id. 351; and *Harlan v. Smith*, 6 Id. 173.

² *Montgomery v. Middlemiss*, 21 Cal. 103; *San Francisco v. Lawton*, 18 Id. 465.

§ 4820. **Personal Judgment—Relief from Erroneous Decree.**—In California parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance.¹ But a personal judgment is not a lien until after sale and deficiency.² Section 246 of the practice act limits the lien of a foreclosure, judgment, or decree, whatever its form, to the mortgaged property until it is exhausted, and there can be no judgment lien upon other property until a deficiency is duly ascertained and docketed.³ Courts of equity are ever ready to grant relief from their decrees.⁴

§ 4821. **Judgment Enjoining Maintenance of Dam.**

Form No. 1144.

[TITLE.]

[Commence as in form No. 4822.]

Wherefore it is ordered, adjudged, and decreed that the defendants, and each of them, their servants, agents, and employees, be perpetually enjoined and restrained from maintaining, erecting, having, or keeping in the channel of creek, at any point above the lands of plaintiff, and particularly at, any dam or artificial obstruction. And it is further ordered, adjudged, and decreed that the permanent injunction of this court issue herein, directed to said defendants, their servants, agents, employees, and attorneys, requiring them, and each of them, to perpetually refrain from having or keeping any dam or artificial obstruction in the channel of said stream, or from interfering with the free flow of the waters of said creek at any point above the plaintiff's lands aforesaid, and that plaintiff have judgment for his costs herein, taxed at the sum of dollars.

[DATE.]

[SIGNATURE.]

§ 4822. **Decree in Actions to Quiet Title.**

Form No. 1145.

[TITLE.]

This cause having been regularly called and tried by the

¹ Cal. Code C. P., sec. 726; Rowland v. Leiby, 14 Cal. 156; Englund v. Lewis, 25 Id. 348; Chapin v. Broder, 16 Id. 403.

² Id.; Culver v. Rogers, 28 Id. 520.

³ Weil v. Howard, 4 Nev. 384.

⁴ Goodenow v. Ewer, 16 Cal. 461. As to how relief may be sought in such cases, consult Boggs v. Hargrave, 16 Id. 559; Raun v. Reynolds, 15 Id. 468; Burton v. Lies, 21 Id. 87; and Leviston v. Swan, 33 Id. 480.

court, and the findings of fact and conclusions of law, and the decision thereon in writing, having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of A. B., plaintiff, against all of the defendants, and for costs against such of the defendants only as have answered contesting the plaintiff's rights in the premises, on motion of E. F., plaintiff's attorney:

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint herein, against the defendants, and each and all of them; that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be and he is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows [here describe the premises].

And it is hereby further ordered, adjudged, and decreed that the plaintiff do have and recover his costs, hereby taxed at dollars, against the following-named defendants.

[DATE.]

[SIGNATURE.]

§ 4823. **Effect of Decree.**—If plaintiff prevail in an action to quiet title, a decree inserted in the judgment, enjoining defendant from making any further contest on plaintiff's title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an acquired title.¹

§ 4824. **Judgment on Verdict.**

Form No. 1146.

[TITLE.]

This day this action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being

¹ Reed v. Calderwood, 32 Cal. 109. As to effect of decree, see Marshall v. Shafter, Id. 176.

called, answered to their names, and say they find a verdict for the plaintiff.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant the sum of dollars, with interest thereon at the rate of per cent per month, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of dollars

Judgment rendered, 18..

§ 4825. **Entry by Clerk.**—When trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict within twenty-four hours, unless the court order the cause to be reserved for argument or further consideration, or grant a stay of proceedings.¹ Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial.² If the verdict of the jury fails to find the lien, the court can not render a judgment essentially different from the verdict, and the judgment so far will be reversed.³ The court will presume after a verdict that facts imperfectly alleged in a complaint have been proved, but it will not presume that a material fact, not at all stated, has been proved.⁴

§ 4826. **Satisfaction of Judgment.**

Form No. 1147.

[TITLE.]

For and in consideration of the sum of dollars, to me paid by, the defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in said court in the said action, on the day of, A. D. 18.., in favor of, the plaintiff in the said action, and against the said defendant, for the sum of dollars, with interest thereon from the day of, A. D. 18.., at the rate of per cent per annum until paid, together with said plaintiff's costs and disbursements, amounting to the sum of dollars, and recorded in book of judgments, at page And I hereby authorize the clerk of said court to enter satisfaction of record of said judgment in the said action.

E. F.,

[DATE.]

Attorney for Plaintiff.

¹ Cal. Code C. P., sec. 664.

² Hutchinson v. Bours, 13 Cal. 51.

³ Walkerv. Hauss-Hijo, 1 Cal. 186.

⁴ Barron v. Frink, 30 Cal. 486.

§ 4827. **By Levy under Execution.**—A levy under execution on sufficient property to satisfy it is a satisfaction of the judgment.¹ The return of a sheriff indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same.² The plaintiff in an execution may accept of promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate.³

§ 4828. **Part Payment.**—A payment of part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment.⁴ The contrary is now, however, the rule in California.⁵

§ 4829. **Memorandum of Costs and Disbursements.**

Form No. 1148

[TITLE.]

DISBURSEMENTS.

Sheriff's fees.....	\$ 15 00
Clerk's fees.....	20 00
Witnesses' fees.....	46 00
[Names of witnesses must be given.]	
Referee's fees.....	50 00
Notary fees.....	10 00
	<hr/>
	\$141 00

State of California, }
City and county of } ss.

E. F., being duly sworn, deposes and says:

I. That he is one of the attorneys for the plaintiff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff.

II. That the items in the above memorandum contained are correct to the best of said affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in the said action.

[JURAT.]

[SIGNATURE.]

§ 4830. **Affidavit.**—The affidavit by the attorney of the party accompanying the bill of costs is good under the statute.⁶

¹ People v. Chisholm, 8 Cal. 30; see also Mulford v. Estudillo, 23 Id. 95; see Cal. Code C. P., sec. 675.

² Mitchell v. Hockett, 25 Cal. 542.
³ Id.

⁴ Deland v. Hiatt, 27 Cal. 611.

⁵ See Cal. Civil Code, secs. 1521-1543; see also Fuller v. Baker, 48 Cal. 632.

⁶ See Cal. Code C. P., sec. 1033.

§ 4831. **Attorney's Fees.**—The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties. But parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.¹ In foreclosure cases, counsel fees are allowed by the court where there is a stipulation in the mortgage for counsel fees.² An attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute.³

§ 4832. **Retaxing Costs.**—If items are included in the bill of costs which are not properly taxable, it affords no just ground for refusing to issue an execution or recalling one, but the remedy is by motion to retax.⁴ If the court adds to the judgment the costs of the prevailing party, after the time for filing the same has expired, and after an appeal has been perfected, the error can only be corrected by an appeal from the order.⁵ Where costs on appeal to the supreme court are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution.⁶

§ 4833. **Costs, when Allowed—Allowance, when Discretionary.**—The allowance of costs rests in discretion of the court of original jurisdiction. And where, on sustaining a demurrer to a complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, the court gave judgment for the defendant for full costs, including a jury fee, it was held no such abuse of discretion as to warrant interference by the supreme court.⁷ The supreme court will only review the ruling of an inferior court in the matter of costs upon an appeal from the judgment in the case.⁸

§ 4834. **In Particular Cases—Claim and Delivery.**—In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action but his right has ceased and vested in the plaintiff before trial, the

¹ California Code of Civil Procedure, sec. 1021.

² See Stat. 1874, p. 707; see also Sichel v. Carrillo, 42 Cal. 494; Patterson v. Donner, 48 Id. 380; and Cal. Code C. P., sec. 1500.

³ Ex parte Kyle, 1 Cal. 331. A lien of the attorney for his costs was settled by this court in Ex parte Kyle, *supra*; and Mansfield v. Dorland, 2 Id.

517; and not allowed: Russell v. Conway, 11 Id. 103.

⁴ Meeker v. Harris, 23 Cal. 286; see Burnham v. Hays, 3 Id. 115.

⁵ Jones v. Frost, 28 Cal. 245.

⁶ Chapin v. Broder, 16 Cal. 403.

⁷ Harvey v. Chilton, 11 Cal. 119.

⁸ Votan v. Reese, 20 Cal. 90. As to when costs are allowed of course, see Cal. Code C. P., secs. 1022–1026.

judgment should leave the property in plaintiff's possession, but award costs to defendant.¹

§ 4835. **Clerk's Duty.**—Within two days after the costs are taxed or ascertained, if not included in the judgment, the clerk must insert the same in a blank left in the judgment for that purpose, and must make a similar entry in the copies and docket of the judgment.²

§ 4836. **Costs are Part of Judgment.**—Costs are included in and constitute a part of the judgment; and hence, though ascertained and adjudged by the court after an entry of the judgment by the clerk may have been made, yet the law considers such action of the court as having preceded the final judgment.³

§ 4837. **Ejectment.**—If the plaintiff in ejectment recovers judgment he is entitled to the costs, although his recovery is for only a portion of the demanded premises, and the defendant recovers judgment for the residue.⁴

§ 4838. **In Equity.**—Costs in equity are always in the discretion of the court, and whether granted or withheld, are but as incidents to, and no part of, the relief sought.⁵

§ 4839. **Injunction.**—In a suit for damages to a mining claim and for an injunction, plaintiffs had judgment for one hundred dollars, and costs taxed at dollars, a perpetual injunction being granted also. After the judgment was entered, plaintiffs moved that costs for the trial be allowed. The motion was denied, except as to the costs accrued by reason of the injunction granted: it was held that this is a case where the allowance of costs is in the discretion of the court below.⁶

§ 4840. **Money or Damages.**—Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the supreme court where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum.⁷

§ 4841. **On Appeal.**—The judgment of the supreme court on appeal, and costs consequent thereon, is final, and the superior court has no authority to prevent immediate execution of the judgment of this court so remitted.⁸ The clerk of the supreme court, in entering up the judgment, adds the words

¹ O'Conner v. Blake, 29 Cal. 312; Edgar v. Gray, 5 Id. 267.

² Cal. Code C. P., sec. 1035. For the former practice, see Chapin v. Broder, 16 Cal. 419.

³ Lasky v. Davis, 33 Cal. 677.

⁴ Havens v. Dale, 30 Cal. 547.

⁵ Gray v. Dougherty, 25 Cal. 282.

⁶ Esmond v. Chew, 17 Cal. 336.

⁷ Dumphy v. Guindon, 13 Cal. 30; see Zabriskie v. Torrey, 20 Id. 174.

⁸ City of Marysville v. Buchanan, 3 Cal. 212.

“with costs,” and annexes to the *remittitur* a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution.¹ The costs on appeal, or properly the costs in this court, and the costs of making up the appeal in the court below, including the costs of making out the transcript and the costs of the former trial, abide the event of the suit.²

§ 4842. **On Judgment Affirmed in Part and Reversed in Part.**—Where a judgment was affirmed in part and reversed in part, the respondent may be allowed his costs in the court below, and be required to pay the costs of the appeal.³ Judgment may be affirmed as to a *mandamus*, but reversed as to costs.⁴ Thus, where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal.⁵

§ 4843. **On New Trial Awarded.**—When a judgment for plaintiff is refused by the appellate court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the court below incurred on the first trial.⁶

§ 4844. **On Judgment Reversed.**—Where a judgment is reversed by the supreme court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the supreme court. The costs of the former trial abide the event of the suit.⁷ Where the judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs.⁸ Appellant made to pay costs, although the judgment is reversed.⁹ If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost.¹⁰ If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been

¹ City of Marysville v. Buchanan, 3 Cal. 212.

² Gray v. Gray and Eaton v. Palmer, 11 Cal. 341; Ex parte Burrill, 24 Id. 350. Case where each party was made to pay his own costs on appeal: Bradbury v. Barnes, 19 Id. 120. Case where costs of motion in supreme court were not allowed: Swain v. Naglee, Id. 127. Case where appellant paid costs in supreme court: Jungerman v. Bovee, Id. 355.

³ Cole v. Swanston, 1 Cal. 51.

⁴ McDougal v. Roman, 2 Cal. 80.

⁵ Welch v. Sullivan, 8 Cal. 512; see Cassin v. Marshall, 18 Id. 693.

⁶ Stoddard v. Treadwell, 29 Cal. 281.

⁷ Ex parte Burrill, 24 Cal. 350.

⁸ Visher v. Webster, 13 Cal. 58.

⁹ Reniff v. The Cynthia, 18 Cal. 669.

¹⁰ Tryon v. Sutton, 13 Cal. 491.

made within the ten days allowed for filing a petition for a rehearing.¹ Defendants below and appellants here, on the main question, to wit, the injunction, required to pay costs in this court on both appeals.²

§ 4845. **On Remittitur.**—The party responsible for erroneous proceedings after the *remittitur* has been sent down from the supreme court must pay the costs of those proceedings, and the costs consequent on a second appeal caused by them.³ If the printed transcript in the supreme court is unnecessarily long, the party responsible for this will be adjudged to pay the costs of printing thus unnecessarily incurred.⁴ The clerk of the court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum and the costs of the clerk of the supreme court, as certified by him in the *remittitur*.⁵

§ 4846. **Right of Use of Water.**—In an action to try the right of the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs.⁶

¹ Gray v. Gray, 11 Cal. 341.

² Jungerman v. Bovee, 19 Cal. 355.

³ Argenti v. City of San Francisco, 30 Cal. 458.

⁴ People v. Holden, 28 Cal. 124.

⁵ Ex parte Burrill, 24 Cal. 350.

⁶ Marius v. Bicknell, 10 Cal. 217; Vautan v. Reese, 20 Id. 90.

PART ELEVENTH.

NEW TRIAL.

CHAPTER I.

NEW TRIAL IN GENERAL.

§ 4847. **In General.**—A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referees.¹ At common law, new trial is defined to be a “re-examination of an issue of fact before a court and jury, which had been tried at least once before the same court and jury.”² It is said “the origin of the practice of granting new trials is concealed in the night of time.” In modern practice, as well as in former times, new trials are granted for the purpose of more fully securing to the parties litigant complete justice. New trials are granted on the theory: 1. That at the former trial there was some error of law committed by the court; or 2. That at the former trial some evidence material to the issue was not presented, the existence of which testimony being then unknown to the party making the application for a new trial, or at the time beyond his control, and which testimony is not cumulative in its character; or 3. Surprise, whereby the rights of the parties were materially affected at the former trial. In other words, new trials are granted for errors of the judge in matters of law, and errors of the jury in matters of fact.³ And in any event, a new trial must be granted for some matter outside of the record.⁴ The law presumes the verdict to be correct, and hence the party excepting must show clearly that the former decision was wrong. Error must distinctly appear, and not be left shadowed in doubt. When, for instance, there are more

¹ Cal. Code C. P., sec. 656; Laws of Nevada, sec. 194; Oregon, sec. 231; Idaho, sec. 208; Arizona, sec. 194; Washington Territory, sec. 275.

² Hilliard on New Trials, 1.

³ Rochell v. Phillips, Hempst. 23.

⁴ Bowie v. The State, 19 Ga. 1.

issues than one submitted, one good, and the rest bad, and a general finding, the presumption is that the jury disregarded the immaterial issue.¹ When a party desires to show that a judge ruled erroneously, it must be made to appear: 1. What rulings were made; 2. That they were excepted to; 3. Wherein they were erroneous; 4. The materiality of the ruling; for unless the error had some influence in determining the verdict, no wrong is done, and a new trial should not be granted;² 5. An exception against the weight of evidence is not good unless it clearly appear that all the evidence is in the record.³ All these are general propositions, which are in this state authoritatively settled by our statute and the decisions of our courts. When a judgment and verdict are in accordance with the evidence, and there is no substantial conflict in it upon any material issue, and no error has intervened, the court has no right to grant a new trial, and if it do so, its order will be set aside as unauthorized.⁴ When a suit has been regularly prosecuted to judgment, and substantial justice has been done, the parties are not entitled to invoke the interposition of the court for the purpose of having the cause retried and again determined at the expense of the public, and to the delay of other suitors, although both of the litigants join in the application.⁵ It is useless to put parties to the additional trouble and expense of a new trial when it is clearly seen that after a protracted litigation the result must be the same;⁶ nor will a new trial be granted, as a general rule, to enable a party to recover nominal damages.⁷ A new trial can not be granted until there has been a determination of the issues of fact.⁸ Where a new trial is ordered, and the order is based upon a decision determining the principles of law which govern the action, the new trial must be conducted in accordance with the principles thus determined.⁹ A new trial can not be prosecuted pending an appeal from an order granting the same.¹⁰ Where judgment of the appellate court directs the court below what judgment to render, a new trial is not authorized.¹¹

¹ Hilliard on New Trials, 17.

² Id. 18.

³ Id. 21.

⁴ Lawrence v. Burnham, 4 Nev. 361.

⁵ Nichols v. Sixth Avenue R. R. Co., 10 Bosw. 260; Phelan v. Ruiz, 15 Cal. 90.

⁶ Tohler v. Folsom, 1 Cal. 207; Smith v. Compton, 6 Id. 26; Suñol v. Hepburn, 1 Id. 285.

⁷ Briggs v. Morse, 42 Conn. 258; McConihe v. N. Y. & E. R. R. Co., 20 N. Y. 495; Nolan v. Harris, 52 How. Pr. 409.

⁸ Putnam v. Crombie, 34 Barb. 232.

⁹ Leese v. Clark, 20 Cal. 387; Soule v. Ritter, Id. 522; Table Mountain Tunnel Co. v. Stranahan, 21 Id. 548; Heirs of Nieto v. Carpenter, Id. 455; Mitchell v. Davis, 23 Id. 381; Moore v. Murdock, 26 Id. 524; Lucas v. San Francisco, 28 Id. 591; Estate of Pacheco, 29 Id. 224; Mulford v. Estudillo, 32 Id. 131; Kile v. Tubbs, Id. 332; Argenti v. Sawyer, Id. 414.

¹⁰ Ford v. Thompson, 19 Cal. 118.

¹¹ Argenti v. City of San Francisco, 30 Cal. 458.

§ 4848. **Power of Court to Grant.**—The courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.¹ So in actions for the recovery of a penalty, although the verdict was in favor of the defendant. On a reversal of a judgment, in an action brought by a writ of error from a district court, the circuit court of another state may, if justice require it, award a *venire facias de novo*, triable at the bar of such circuit court, according to the provisions of section 24 of the act of September 24, 1789.² If an order granting a new trial be reversed on the ground that it was prematurely made, the effect is to leave the motion for a new trial still pending in the court below to be regularly disposed of.³ If the judge of a district or circuit court die, his successor has power to grant a new trial.⁴ The power of a court of common law to grant new trials, and the grounds upon which it may be granted, explained.⁵ The legislature has no power to grant a new trial or reopen a judgment in an action litigated between individuals.⁶ The court has power to set aside report of referee, and grant a new trial, on the ground that evidence before referee did not justify his decision.⁷ Or for any reason that would be sufficient to set aside the award of an arbitrator,⁸ or the verdict of a jury.⁹ The court may of its own motion, without the application of either party, vacate the verdict of a jury and grant a new trial, where the court is satisfied that the verdict was rendered under a misapprehension of the instructions, or the influence of passion or prejudice.¹⁰ And where the defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate court may order a new trial, although the defendant did not move for a new trial, and denies the power of the court to grant one.¹¹ The county court in California, prior to the present constitution, had power to grant a new trial. The appellate power of the supreme court over the county court could not be properly or efficiently exercised unless the power to grant a new

¹ U. S. R. S., ed. 1878, sec. 726.

² United States v. Sawyer, 1 Gall. 86; see also United States v. Wonsan, Id. 5; United States v. Harding, 1 Wall. jun. C. C. 127; United States v. Macomb, 5 McLean, 286; United States v. Taylor, 4 Cranch C. C. 338.

³ Thomas v. Sullivan, 11 Nev. 280.

⁴ Life and Fire Ins. Co. of N. Y. v. Wilson, 8 Pet. 291.

⁵ United States v. Thirteen hundred and sixty-three bags of merchandise, 2 Sprague, 85.

⁶ People v. Frisbie, 26 Cal. 135.

⁷ Cappe v. Brizzolara, 19 Cal. 607.

⁸ Headley v. Reed, 2 Cal. 322.

⁹ McHenry v. Moore, 5 Cal. 90.

¹⁰ Cal. Code C. P., sec. 662; see Duff v. Fisher, 15 Cal. 375.

¹¹ State v. Rover, 10 Nev. 388.

trial existed in the county court.¹ But the county court had no power to grant a new trial, in a special case, to contest an election under the statute.² Such proceedings are special cases.³ A *mandamus* would not lie to compel a county judge to try a cause, on the ground that he has improperly dismissed the appeal taken from a justice's court.⁴ On appeal from the justice's court to the superior court, on questions of law alone, if a new trial be ordered, it should take place in the superior court.⁵

§ 4849. **Powers of Equity.**—Courts of equity will not grant relief against judgments recovered at law, unless the party asking for relief was unable to avail himself of his defense in the action at law, or was prevented from doing so by fraud, accident, or mistake, without negligence on his part.⁶ A bill of review for new trial must be filed within the time allowed for the prosecution of an appeal or writ of error.⁷ The application must be made promptly; it is too late two years after the facts are discovered.⁸ It is a well-established rule that equity never will grant a new trial of a matter which has been determined in a court of law; it being a matter over which the court of law has full jurisdiction.⁹ But where injustice is done by a final judgment, without default of defendant therein in pleadings, or producing evidence, equity will interfere. Or the chancellor may direct a new trial at law, on good grounds, and on sufficient reason being shown for failure to apply to the common-law judge.¹⁰ So a new trial at law was decreed where the officer's return had been altered. Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting such trial; but it will only interfere in case of newly discovered evidence, surprise, or fraud, or where a party is deprived of the means of defense by circumstances beyond his control.¹¹ Chancery will not order a new trial at law in favor of a party who has neglected to apply at law, except under very special circumstances.¹² A party can

¹ Dickenson v. Van Horn, 9 Cal. 207.

² Casgrave v. Howland, 24 Cal. 457; see Dorsey v. Barry, Id. 455.

³ Keller v. Chapman, 34 Cal. 640.

⁴ People v. Weston, 28 Cal. 639.

⁵ People v. Freelon, 8 Cal. 517.

⁶ Quinn v. Wetherbee, 41 Cal. 247.

⁷ Allen v. Currey, 41 Cal. 318.

⁸ Neal v. Byers, 45 Cal. 234.

⁹ Green v. Robinson, 5 How. (Miss.)

80.

¹⁰ Hunt v. Boyier, 1 J. J. Marsh.

484.

¹¹ Horn v. Queen, 4 Neb. 108.

¹² Hill v. McNeill, 8 Port. 432; Gales v. Shipp, 2 Bibb, 241; Patterson v. Matthews, 3 Id. 80.

not maintain an action in a court of equity, to obtain a new trial in a court of law, without showing that he had no opportunity to move for a new trial in the law court, by reason of mistake, accident, or surprise, unaccompanied by any fault or negligence on his part.¹ Or where no circumstances of fraud are shown.² Or unless the judgment was obtained through fraud, accident, or mistake, unconnected with negligence or inattention on the part of the judgment debtor.³ A purchaser of land during pendency of suit against grantor for its recovery, with notice of suit pending, who neglects to defend it till judgment is rendered, and then neglects to move for a new trial, can not obtain a new trial in a court of equity.⁴ An application made in a court of equity for a new trial, on the ground that the defendant was defaulted, and thereby prevented from maintaining a claim in set-off, will be refused, if it does not appear that he is in danger of losing his claim.⁵ A court of equity should not grant a new trial at law upon the ground that a party was deprived, without fault on his part, of his remedy, by writ of error to correct erroneous rulings on the first trial, when no error in the judgment at law appears on the record.⁶ Where a party moves for a new trial and fails, he can not, on the same facts, go into equity to enjoin the judgment rendered.⁷ In a suit in equity, if the issues are submitted to a jury and a general verdict returned, which the court afterwards sets aside on motion for a new trial, it is unnecessary for the court to grant a new trial; the court may, upon the testimony already given, and such further testimony as may be taken, in its discretion determine the issues of fact and give final judgment.⁸

§ 4850. **Granting Motion Discretionary.**—Motions for new trial are addressed to the sound discretion of the court, and are granted or denied, not as matter of strict right, but as the substantial justice of the case may appear to require.⁹ And

¹ Mastick v. Thorp, 29 Cal. 444; Faulkner v. Harwood, 6 Rand. 125; but see Cummins v. Kennedy, 4 J. J. Marsh. 642; Harrison v. Harrison, 1 Litt. 137.

² Borland v. Thornton, 12 Cal. 441; Boston v. Haynes, 33 Id. 31; Land v. Elliott, 1 Smed. & M. 608; Herring v. Winans, 1 Smed. & M. Ch. 466.

³ Day v. Welles, 31 Conn. 344.

⁴ Mastick v. Thorp, 29 Cal. 444.

⁵ Clute v. Ewing, 21 Tex. 679.

⁶ Parker v. Horne, 38 Miss. 215.

⁷ Collins v. Eutler, 14 Cal. 223; Borland v. Thornton, 12 Id. 441; Mastick v. Thorp, 29 Id. 444.

⁸ Wingate v. Ferris, 50 Cal. 105.

⁹ Drake v. Palmer, 2 Cal. 177; affirmed in Hastings v. Steamer Uncle Sam, 10 Id. 341; Palmer v. Stewart, Id. 353; Speck v. Hoyt, 3 Id. 413; Peters v. Foss, 16 Id. 357; Smith v. Richmond, 15 Id. 501; Nooney v. Mahoney, 30 Id. 226; O'Brien v. Brady, 23 Id. 243; Quinn v. Kenyon, 22 Id. 82; Lestrade v. Barth, 17 Id. 286; Hall v. Bark Emily Banning, 33 Id. 525; Clayton v. Yarrington, 33 Barb. 145; State v. Anderson, 19 Mo. 241; McLanahan v. Universal Ins. Co., 1 Pet. 170; Calbreath v. Gracy, 1 Wash. C. C. 198; Denniston v. Mc-

where a new trial has been granted it is presumed the discretion was properly exercised; and the burden of showing that it was not devolves upon the party appealing from the order.¹ A court is not bound to grant a new trial, although both parties desire it.² Where a new trial was granted on the ground of irregularity in the presence of the court, the appellate court will not review the question as to whether the court below was mistaken on the question of fact involved.³ A new trial should not be granted unless the evidence strongly preponderates against the verdict.⁴ Or where the question of law was adverse to the verdict.⁵ Or where errors intervened in the trial of a cause.⁶ Or where the judgment is erroneous, by reason of a wrong construction given to the description of land in a deed in evidence.⁷ So where on the trial it was not fully disclosed by the evidence where the initial point was located in the boundary of land, a new trial was ordered for a more full disclosure.⁸ Or where the jury, without particular instructions, returned a verdict payable in gold coin, though there was no evidence that the defendant promised in writing to pay in gold coin, a new trial was granted.⁹ But a new trial will not be granted to allow a party to contradict admissions on a former trial.¹⁰ In Indiana, it appears in a civil case, only two new trials can be granted to the same party in the cause, upon any grounds whatever.¹¹ The court will not entertain a second application for a new trial by the same party in the same suit, unless it appears or is shown that the party did not know or could not have known the grounds upon which the second application rests at the time the former application was submitted.¹² In New York, in actions to recover possession of lands, the grant of a third trial is in the discretion of the court.¹³

Keen, 2 McLean, 253; *United States v. Martin*, Id. 256; *Benedict v. Davis*, Id. 347; *Lloyd v. Scott*, 4 Cranch C. C. 206; *Shepherd v. Brenton*, 15 Iowa, 84; *Whitney v. Blunt*, Id. 283; *McNair v. McComber*, Id. 368; *McKay v. Thorington*, Id. 25; *Head v. Langworthy*, Id. 235; *House v. Wright*, 22 Ind. 383; see also *Forrest v. Forrest*, 25 N. Y. 501.

¹ *Hobler v. Cole*, 49 Cal. 250. That it is not a matter of mere discretion in all cases, see *Anderson v. Rome, W. & O. R. R. Co.*, 54 N. Y. 334; *Sacramento etc. M. Co. v. Showers*, 6 Nev. 291.

² *Phelan v. Ruiz*, 15 Cal. 90; *Aiken v. Bruen*, 21 Ind. 137; *Nichols v. Sixth Av. R. R. Co.*, 10 Bosw. 260.

³ *Thompson v. Thornton*, 47 Cal. 76.

⁴ *Treadway v. Wilder*, 9 Nev. 67; *Williams v. State*, 9 Mo. 268; *Robbins v. Alton etc. Ins. Co.*, 12 Id. 380; *Williams v. Buker*, 49 Me. 427.

⁵ *Speck v. Hoyt*, 3 Cal. 413.

⁶ *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

⁷ *Hicks v. Coleman*, 25 Cal. 145; *Piercy v. Crandall*, 34 Id. 334.

⁸ *Piercy v. Crandall*, 34 Cal. 334.

⁹ *Howard v. Roeben*, 33 Cal. 399.

¹⁰ *Vandall v. S. S. F. Dock Co.*, 40 Cal. 92.

¹¹ *Roberts v. Robeson*, 22 Ind. 456.

¹² *Hayes v. Kenyon*, 7 R. I. 531.

¹³ *Wright v. Milbank*, 9 Bosw. 672.

§ 4851. **Court may Impose Terms.**—Where a new trial is asked as a matter of favor or rests in the discretion of the court, a condition may be imposed upon granting it; but where a party asks it as a matter of right, because some legal error was committed, the appellate court has no discretion to grant or withhold it; but, finding error, is bound to reverse the judgment and grant a new trial, and can not impose a condition thereon.¹ If the findings are not sustained by the evidence, in a question of damages, the court may require the plaintiff to remit the damages or submit to a new trial.² After the court grants a new trial on terms, as a rule the court above will not interfere in these matters.³ The terms upon granting new trials are peculiarly within the discretion of the court, with the exercise of which the appellate court will not interfere, except on a clear showing of abuse or grossly unreasonable terms.⁴ It seems to be the rule in England, if a new trial is allowed on a question of merits, costs will be allowed, but otherwise if allowed for irregularity.⁵ So if payment of costs be made a condition precedent, and it is not done in the time prescribed, the judgment remains in force.⁶ Where a party complies with the terms imposed and avails himself of the order, he can not afterwards question its correctness.⁷

CHAPTER II.

PROCEEDINGS ON MOTION FOR NEW TRIAL.

§ 4852. **Steps Requisite.**—There are three distinct steps recognized in a proceeding to obtain a new trial, for the taking of which, except the last, a particular period of time is allowed: 1. A notice of intention to move for a new trial; 2. Filing and serving statements or affidavits; and 3. The motion for a new trial.⁸ An order extending the time for taking either of these steps should express with precision the object to be attained.⁹

¹ *Anderson v. Rome, W. & O. R. R. Co.*, 54 N. Y. 334.

² *Carpentier v. Gardner*, 29 Cal. 160; see *Paterson v. Ely*, 19 Id. 28; *Benedict v. Cozzens*, 4 Id. 382.

³ *Hilliard on New Trial*, 53.

⁴ *Rice v. Gashiric*, 13 Cal. 54; *Battelle v. Connor*, 6 Id. 140. Reduction of verdict: *Harrison v. Peabody*, 34 Id. 179; *Chapin v. Bourne*, 8 Id. 296. On payment of costs: *Tyson v. Wells*,

1 Id. 378; *Overing v. Russell*, 28 How. Pr. 151; see also *East River Bank v. Hoyt*, 22 Id. 478; *North v. Sergeant*, 33 Barb. 350; *Zimmerman v. Marchland*, 23 Ind. 474.

⁵ *Hilliard on New Trial*, 53.

⁶ Id.; *State v. Jacobs*, 6 Tex. 199.

⁷ *Battelle v. Connor*, 6 Cal. 140.

⁸ *Jenkins v. Frink*, 27 Cal. 337.

⁹ Id.

§ 4853. Notice of Intention to Move for New Trial.

Form No. 1149.

[TITLE.]

To, attorney for plaintiff:

Take notice, that defendant, C. D., intends to move the court to vacate and set aside the verdict [or decision of the court] rendered in the above cause, and to grant a new trial of said cause, upon the following grounds, to wit:

I. Irregularity in the proceedings of the court [jury, or adverse party, or any order of the court, or abuse of discretion], by which the defendant was prevented from having a fair trial.

II. Misconduct of the jury [or a resort by the jury to the determination of chance on the questions submitted to them].

III. Accident or surprise, which ordinary prudence could not have guarded against.

IV. Newly discovered evidence material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

V. Excessive damages appearing to have been given under the influence of passion or prejudice.

VI. Insufficiency of the evidence to justify the verdict [or other decision; or that the verdict is against law].

VII. Errors in law occurring at the trial, and excepted to by the defendant, to wit.

Said motion will be made upon affidavits hereafter to be filed and served upon you [or upon bill of exceptions, or a statement of the case hereafter to be prepared, or upon the minutes of the court in said cause].

§ 4854. Application, how Made.—When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the foregoing notice, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court or a bill of exceptions or a statement of the case.¹ And the notice of intention must designate the grounds upon which the motion will be made, and whether it will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case.²

¹ See Cal. Code C. P., sec. 657. If the motion be made on the minutes of the court, and the ground is insufficiency of evidence or errors of law, the notice must specify the particulars wherein the evidence is insufficient, or the particular errors of law, or the motion must be denied: Cal. Code C. P., sec. 659, subd. 4. See specifications appended to statement on motion for new trial, *post*.
² Cal. Code C. P., sec. 658.
³ Id. 659.

§ 4855. **Notice, Time within Which It must be Given.** The party intending to move for a new trial must, within ten days after the verdict of the jury if the action was tried by a jury, or after notice of the decision of the court or referee if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention.¹ Where notice of the decision is necessary, the time within which notice of intention to move for new trial must be served does not begin to run until after written notice of the decision has been given.² And where it does not appear that any written notice of the decision had been given, the statement can not be objected to on the ground that it was not filed in time.³ If notice is not served and filed within the time the motion is properly denied,⁴ an admission of service on a certain day is not a waiver of the objection that service on that day is too late.⁵

§ 4856. **Notice, how Given.**—Notice of intention must be given in writing.⁶ And must be served upon the attorney of record of the party,⁷ unless such service is waived.⁸ And must be given by the attorney of the record of the party giving it.⁹

§ 4857. **Notice Generally.**—The notice must designate the grounds upon which the motion will be made, or it is insufficient, and the defect is not cured by designating the grounds in the statement.¹⁰ A notice stating as a ground of the motion the insufficiency of the evidence to sustain the “judgment,” or that the “judgment” is against law, is improper; for the motion is not directed at the judgment, but at the verdict or other decision of fact.¹¹ Notice of intention, filed within the statutory time, gives the court jurisdiction so far as to be able to dispose properly of the motion for new trial, even if the term is adjourned; but if no notice is filed, then the court loses jurisdiction of the case.¹² The court can not order notice filed *nunc pro tunc*.¹³ The ten days do not begin to run till written notice of the rendering of the decision has been served.¹⁴ A party can not abandon his first notice and file a second.¹⁵ Failure to file and

¹ Cal. Code C. P., sec. 659.

² Roussin v. Stewart, 33 Cal. 208; Sawyer v. San Francisco, 50 Id. 370; People v. Center, 5 West Coast Rep.

³ Burnett v. Stearns, 50 Cal. 468.

⁴ Clark v. Gridley, 49 Cal. 108; Hale v. Coveny, Id. 555.

⁵ Towdy v. Ellis, 22 Cal. 650. See “Time, Extension of,” *post*.

⁶ Cal. Code C. P., sec. 1010; Bear River etc. Co. v. Boles, No. 1, 24 Cal. 356; Killip v. Empire Mill Co., 2 Nev. 34.

⁷ Cal. Code C. P., sec. 1015.

⁸ Frost v. Meetz, 52 Cal. 664.

⁹ Prescott v. Salthouse, 53 Cal. 221.

¹⁰ Street v. Lemon M. & M. Co., 9 Nev. 251.

¹¹ Martin v. Matfield, 49 Cal. 42.

¹² Killip v. Empire Mill Co., 2 Nev.

¹³ Id.

¹⁴ Roussin v. Stewart, 33 Cal. 208; Carpentier v. Thurston, 30 Id. 123.

¹⁵ Le Roy v. Rasette, 32 Cal. 171.

serve notice of intention on the opposite party within the time prescribed is a waiver of right to move for a new trial.¹

§ 4858. **Notice as a Stay of Proceedings.**—A motion for a new trial will not suspend an injunction.² If the plaintiff is entitled to an injunction, and obtain one before the trial, he is entitled to retain it upon the cause being remanded for a new trial.³ Nor, after court has filed its findings and sent the case to a referee, will it stay the proceedings pending before said referee.⁴

§ 4859. **Notice must be Given or Waived.**—Notice must be either given or waived to give jurisdiction.⁵ And unless the record contains evidence of the service of the notice, or it clearly appears that service of the notice was waived, the court has no jurisdiction of the motion.⁶ If no notice is given of an intention to move for a new trial, a statement made and filed and agreed to by the parties, or settled by the judge, can not be made the foundation of a motion, nor annexed to the record of the judgment or order from which the party may appeal.⁷ But where the attorneys stipulate in writing appended to the statement that "the foregoing statement is a true and correct statement on motion for a new trial; that upon said statement the said court did, on, etc., overrule the plaintiffs' motion for a new trial and refuse to grant the plaintiffs a new trial, to which plaintiffs then and there excepted; and further, that the judgment roll, etc., and the aforesaid statement on motion for a new trial, and this stipulation, is a true and correct transcript on appeal, and may be used without further certificate," etc.—a notice may be presumed to have been given, though none appears on the record.⁸

§ 4860. **Time, Extension of.**—Time to give notice of intention may be extended thirty days.⁹ An order extending the time to prepare and file a motion extends the time to give notice of motion for a new trial; and an order extending the time for more than the period allowed by statute is good for the statutory extension.¹⁰

§ 4861. **Waiver of Notice.**—The filing of a counter-statement is a waiver of objection to a want of notice of intention.¹¹

¹ Bear River etc. Co. v. Boles, No. 1, 24 Cal. 354; Caney v. Silverthorne, 9 Id. 67; Elsassar v. Hunter, 26 Id. 279.

² Ortman v. Dixon, 9 Cal. 23.

³ Hess v. Winder, 34 Cal. 270.

⁴ Crowther v. Rowlandson, 27 Cal. 376.

⁵ Bear River etc. Co. v. Boles, No. 1, 24 Cal. 354.

⁶ Calderwood v. Brooks, 28 Cal. 151.

⁷ Flateau v. Lubeck, 24 Cal. 364.

⁸ Godchaux v. Mulford, 26 Cal. 316.

⁹ Cal. Code C. P., sec. 1054; Harper v. Minor, 27 Cal. 107.

¹⁰ Cottle v. Leitch, 43 Cal. 320.

¹¹ Williams v. Gregory, 9 Cal. 76.

But if the record does not show that the party resisting application for a new trial proposed amendments to the statement, or participated in its settlement, waiver of service will not be presumed.¹

§ 4862. **Motion on Affidavits.**—When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions in the foregoing notice of intention, it must be made upon affidavits.² If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending or a judge thereof may allow, file such affidavit with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party.³

§ 4863. **Affidavit on Ground of Irregularity.**

Form No. 1150.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. The jury was irregularly impaneled in the said cause, having been selected by the sheriff from the by-standers, and not from the body of the county; that no *venire* was issued in said cause, nor return thereon made by the sheriff of said county.

Or, II. That the jury, after having retired, were permitted to come into court and receive instructions during the absence of the defendant herein, and of his counsel.

[JURAT.]

[SIGNATURE.]

§ 4864. **Application, Grounds of.**—Application for new trial may be made because of irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion, by which either party was prevented from having a fair trial.⁴ The irregularity mentioned must be distinguished from errors of law, as the motion, if made on the latter ground, is not based on affidavit.⁵

§ 4865. **Abuse of Discretion.**—Under certain circumstances, it has been held an abuse of discretion for the court to refuse to allow the defendant permission to verify his answer, and grant a motion to strike it out, when the cause came on for trial, no objection having been made to it before that time.⁶

¹ *Calderwood v. Brooks*, 28 Cal. 151.

² Cal. Code C. P., sec. 658; Nevada, sec. 196; Oregon, sec. 235; Arizona, sec. 196; Idaho, sec. 210.

³ Cal. Code C. P., sec. 659, subd. 1.

⁴ Cal. Code C. P., sec. 657, subd. 1.

⁵ See *Wilcoxson v. Burton*, 27 Cal. 232, 238.

⁶ *Lattimer v. Ryan*, 20 Cal. 628.

But an enlarged discretion is given to lower courts in the conduct of their business, with which an appellate court will not interfere, unless it affirmatively appear that injustice has been done.¹

§ 4866. **Adverse Party, Misconduct of.**—A motion for a new trial for misconduct of the opposite party must be accompanied by an affidavit of the facts relied on.² Where counsel is allowed to read to the jury as a part of his opening statement, against the objection of the opposite party, matter which is not competent as evidence, and which is afterwards excluded when offered as evidence, it is an irregularity entitling the party injured to a new trial.³ So, also, where counsel is permitted to use abusive language toward a prisoner and insinuate that he did not dare stand a fair and impartial trial, held that it created a prejudice against the prisoner and entitled him to a new trial.⁴ Improper conduct on the part of the prevailing party towards a witness, as by threats, persuasions, etc., is a ground for new trial.⁵ Or the production of an interested witness, known to be such, without disclosing the circumstance.⁶ If defendant, without objection, permits plaintiff's counsel to draw inferences which he deems unfair and unjust, or to indulge in argument calculated to improperly influence, prejudice, or mislead the jury, it is too late after verdict to rely upon it as grounds for a new trial.⁷ Also where plaintiff had erred in practice, through erroneous advice of counsel, a new trial will be ordered.⁸ But this does not seem to be a good reason for a new trial. Disorderly conduct on part of spectators, calculated to influence the jury, as being a manifestation of popular feeling, or which prevents the jury from hearing the charge: *quere*.⁹ A new trial awarded in a peculiar case on the ground that the case had not been fully considered in certain important aspects.¹⁰

§ 4867. **Affidavits must be Identified.**—Where an order is made granting a new trial, on affidavits, if the affidavits are not identified so as to entitle them to be considered on appeal, the order will be reversed.¹¹ And the identification must show that they were read or referred to on the argument; the ordinary indorsement of filing by the clerk is not sufficient.¹²

¹ Broadus v. Nelson, 16 Cal. 79.

² Pagnetel v. Gauche, 17 La. Ann. 63.

³ Scripps v. Reilly, 34 Mich. 384.

⁴ State v. Smith, 75 N. C. 306.

⁵ Owen v. Atkinson, 7 Mod. 156.

⁶ Niles v. Brackett, 15 Mass. 378.

⁷ Ames v. Potter, 7 R. I. 265.

⁸ Rogers v. Niagara Ins. Co., 2 Hall, 559.

⁹ Conrad v. Williams, 6 Hill, 444.

¹⁰ Mills v. Van Voorhis, 20 N. Y. 412; S. C., 10 Abb. Pr. 152.

¹¹ Dean v. Pritchard, 9 Nev. 231; State v. Parsons, 7 Id. 57.

¹² Johnson v. Muir, 43 Cal. 542. The present California code civil procedure differs in its terms from the former practice act, under which the above decision was rendered.

§ 4868. **Exceptions must be Taken.**—A new trial will not be granted where one of the jurors was a stockholder in the company defendant, if the fact was known to counsel for plaintiff before entering on the trial, and no objection was made until after the trial had proceeded for some time.¹ Nor for interest of a juror, if known to counsel before the trial.² Nor that judge is not impartial, if then known to counsel.³ The absence of a juror, and suspension of examination thereby without objection, is held no objection to the verdict.⁴

§ 4869. **Grounds of Motion.**—A new trial will be ordered when there is such irregularity in the proceedings that the ends of justice will be better subserved.⁵ It is within the discretion of the court to set aside a verdict in consequence of irregularity in the conduct of the jury.⁶ The misconduct must be shown, and it must be shown to have resulted to the injury of the party against whom verdict was rendered.⁷ So in a criminal case,⁸ if the misconduct or irregularity is satisfactorily proved, positive injury need not be shown.⁹ Where the judgment was rendered at nine A. M. upon a summons citing defendant to appear at ten A. M. a new trial will be ordered.¹⁰ So, also, if after the jury has once retired, they are allowed to come into court and receive instructions in the absence of the parties or their counsel.¹¹ If the court, after the case is submitted, examines books of account as evidence which have not been given in evidence during the trial, the "irregularity" must be stated in the record to be one of the grounds on which motion will be made for a new trial.¹² Where it is evident the jury acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be granted.¹³ Or where it is manifest from the testimony that the verdict of the jury must have been given under a state of great excitement.¹⁴ But that one of the jurors

¹ Orrok v. Commonwealth Ins. Co., 21 Pick. 456.

² Kent v. Charlestown, 2 Gray, 281.

³ Crosby v. Blanchard, 7 Allen, 385.

⁴ Eastman v. Tuttle, 1 Cow. 248; Ex parte Hill, 3 Id. 355; see "Exceptions," *ante*.

⁵ Sannickson v. Brown, 5 Cal. 58.

⁶ United States v. Gillies, Pet. C. C. 159; Knight v. Freeport, 13 Mass. 218; McIlvaine v. Wilkins, 12 N. H. 474, 476; People v. Douglas, 4 Cow. 26; Wright v. Burchfield, 3 Ohio, 53; Smith v. Harrow, 3 Bibb, 446; Reynolds v. The Champ. Trans. Co., 9 How. Pr. 7; Cain v. Cain, 1 B. Mon. 213; Hanks v. State, 21 Tex. 526;

Drummond v. Leslie, 5 Blackf. 453; Busick v. State, 19 Ohio, 198.

⁷ Smith v. Thompson, 1 Cow. 221; Horton v. Horton, 2 Id. 589; Oliver v. First Presb. Church, 5 Id. 283; Wilson v. Abrahams, 1 Hill, 207; Harrison v. Price, 22 Ind. 165.

⁸ Whelchell v. State, 23 Ind. 89.

⁹ Johnson v. Root, 2 Fish. Pat. Cas. 291; compare Henry v. Ricketts, 1 Cranch C. C. 545; Madden v. State, 1 Kan. 340.

¹⁰ Parker v. Shephard, 1 Cal. 132.

¹¹ Redman v. Gulnac, 5 Cal. 148.

¹² Wilcoxson v. Burton, 27 Cal. 237.

¹³ Minturn v. Burr, 20 Cal. 48.

¹⁴ People v. Acosta, 10 Cal. 195.

“knew and was aware of the circumstances connected with the affair,” if no objection to him was made until after verdict rendered, is not sufficient ground.¹

§ 4870. **Irregularities.**—If the character of a witness is called in question during the trial, it is an irregularity for the judge to make a remark from the bench indorsing the respectability of the witness, and if the testimony of the witness is material, judgment would be reversed for such irregularity; but if the testimony be immaterial, the judgment will not be reversed, though the conduct of the judge be disapproved.² In a trial by the court, if testimony be admitted on the hearing against the objections of a party, and afterwards on the determination of the cause the court exclude such testimony from its consideration, it is an irregularity, for the parties are entitled to have the case determined in accordance with the ruling at the trial.³ Where the jury, after having been out for a long time considering of their verdict, return into court and report that they are unable to agree, and the court gives them further instructions, closing with the remark, “You must agree upon a verdict; I can not discharge you until you agree upon a verdict,” and the jury soon return with a verdict of no cause of action, the verdict was set aside as obtained by constraint.⁴ After a jury retires for deliberation, it is error for the judge trying the cause to send a communication to them, unless by consent of counsel on both sides, and the better practice is to communicate in open court.⁵

§ 4871. **Insufficient Grounds.**—It is no ground for setting aside a verdict that there were good grounds of challenge to a juror;⁶ nor that the court rejected a competent juror;⁷ nor the withdrawal of a juror, and the continuance of a case thereby.⁸ Or where the officer in charge permits a juror to go into his own house to change his linen, if in sight of the officer.⁹ The bare fact that evidence is brought to the notice of the jury out of its regular order¹⁰ is insufficient. Where the attorney for the prevailing party, at the request of one of the jurors, after their retirement, sent for a bottle of liniment which had been prepared for the juror to relieve his pain, and the liniment was passed in by the officer, it was held that this was not such an irregularity as would vitiate the verdict.¹¹ There is a marked distinction

¹ *Lawrence v. Colliers*, 1 Cal. 37.

² *McMinn v. Whelan*, 27 Cal. 319.

³ *Carpentier v. Small*, 35 Cal. 364.

⁴ *Slater v. Mead*, 53 How. Pr. 57.

⁵ *Plunkett v. Appleton*, 51 How. Pr. 469.

⁶ *Thompson v. Paige*, 16 Cal. 77;

Hollingsworth v. Duane, Wall. C. C. 147.

⁷ *West v. Forrest*, 22 Mo. 344.

⁸ *Benedict v. Cozzens*, 4 Cal. 382.

⁹ *State v. O'Brien*, 7 R. I. 336.

¹⁰ *Rice v. Cunningham*, 29 Cal. 492.

¹¹ *Carnaghan v. Ward*, 8 Nev. 30.

between the performance of an act of humanity or duty toward a juror and the voluntary offer of civilities, such as treating with spirituous liquors.¹ The fact that instructions given by the court are lost or mislaid is no ground for a motion for new trial.² Nor that a deposition alleged to contain material matter was lost, if not used on the trial.³ If a juror, before retiring, asks the clerk as to a fact appearing from the records, and no objection is made, a new trial should not be granted.⁴ Calling in the clerk to inquire if they were correctly informed how to make the computation, no injury resulting,⁵ is not sufficient grounds. Where a slip of newspaper was handed by the deputy sheriff to the jury during the trial, containing matters relating to the trial, and the court subsequently instructed the jury that the slip was not in evidence, and should be wholly disregarded, and it appeared that the perusal could not have prejudiced the losing party, it was held not ground for new trial.⁶ In Illinois, where the sheriff communicates with the jury by remarks, he may be fined.⁷ Or where juror read report of the cause in a newspaper to which he was a regular subscriber, it is not sufficient grounds;⁸ or had heard the case discussed, if the objection be not raised at the proper time.⁹ Where the interference of strangers with the jury is unattended with corruption in the latter, and has not been prompted by a party, and it does not appear that any injustice has thereby been done, it is not sufficient.¹⁰ Where a sealed verdict was given to the officer in charge of the jury, the clerk being absent, which was given to the clerk next morning, and the next morning the verdict is opened in presence of the jury and read by the clerk, without exception, it is not sufficient ground for a new trial.¹¹ A new trial will not be granted in a criminal case because sheriff takes charge of the jury where a deputy sheriff was sworn, nor because the judge informs the jury, through the sheriff, that if they do not agree in five minutes they must remain in the jury-room over night.¹²

§ 4872. **Taking out Papers.**—If the jury take out plaintiff's account without the consent of the defendant, the court will

¹ Carnaghan v. Ward, 8 Nev. 30. The latter was held sufficient to set aside the verdict in Sacramento etc. M. Co. v. Showers, 6 Nev. 291.

² Visher v. Webster, 13 Cal. 58.

³ Chapman v. Chapman, 4 Call, 430.

⁴ Allen v. Blunt, 2 Woodb. & M. 121, 147.

⁵ Dennison v. Powers, 35 Vt. 39.

⁶ Thrall v. Smiley, 9 Cal. 529; see

also, to the same effect, United States v. Gilbert, 2 Sumn. 19.

⁷ Reins v. People, 30 Ill. 256.

⁸ U. S. v. Reid, 12 How. U. S. 361.

⁹ State v. Daniels, 44 N. H. 383.

¹⁰ People v. Boggs, 20 Cal. 432; affirmed in People v. Symonds, 22 Id. 353; but see Nesmith v. Clinton Fire Ins. Co., 8 Abb. Pr. 141.

¹¹ Paige v. O'Neal, 12 Cal. 483.

¹² People v. Hughes, 29 Cal. 257.

grant a new trial.¹ But if papers taken out without consent are not read by the jury, it is held no ground for setting aside the verdict.² Or that they took out through mistake a deposition which was irrelevant and immaterial to the issue. *Aliter* if it was delivered to the jury, by the counsel of the party in whose favor verdict was rendered.³ The jury having found a sealed verdict, but upon being polled one of them dissented, on being sent out for further deliberation they returned all concurring in the same verdict, it was held no irregularity.⁴ The mere fact that a juror attempts to communicate the verdict to a party in whose favor it is rendered, before its announcement, is not sufficient ground for setting a verdict aside.⁵

§ 4873. **Affidavit on Ground of the Misconduct of the Jury.**

Form No. 1151.

[TITLE.]

[VENUE.]

'L. M., being duly sworn, deposes and says as follows:

The jury impaneled in the above-entitled cause, in finding their verdict in the same, resorted to the determination of chance, to wit [each juror threw dice, upon an agreement that the one who threw the highest number should name the verdict, whereupon Q. R. threw the highest number and fixed the verdict].

[JURAT.]

[SIGNATURE.]

§ 4874. **Affidavit.**—Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.⁶ The affidavit need not be made by a juror guilty of the misconduct complained of.⁷ And it seems it may be made by the sheriff having the jury in charge.⁸ Being in derogation of the common law, this statute must be strictly construed, and will only be allowed in case of a chance verdict.⁹

§ 4875. **Chance Verdict.**—The verdict to which the assent of any of the jurors was obtained by a resort to chance will be

¹ *Hutchinson v. Decatur*, 3 Cranch C. C. 291; see also *United States v. Clark* 2 Id. 152; *contra*: *Simms v. Templeman*, 5 Id. 163.

² *Hackley v. Hastie*, 3 Johns. 252; compare *Mitchell's Case*, 1 City Hall Rec. 147.

³ *Lonsdale v. Brown*, 4 Wash. C. C. 148.

⁴ *Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352.

⁵ *Fash v. Byrnes*, 14 Abb. Pr. 12.

⁶ Cal. Code C. P., sec. 657, subd. 2.

⁷ *Donner v. Palmer*, 23 Cal. 48.

⁸ *Wilson v. Berryman*, 5 Cal. 44.

⁹ *Turner v. Tuolumne County Water Co.*, 25 Cal. 400.

set aside.¹ Where the jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiff was justly entitled to recover, which amounts, after being added together, should be divided by twelve, and that the quotient should be their verdict, is a chance verdict, if they agree to be bound by the result.² It is not a chance verdict within the meaning of the statute, and the affidavits of jurors can not be received to impeach it.³ That is not a chance verdict, if they do not agree to be bound by the result, but reserve to themselves the right to dissent.⁴ Where a portion of the jury are induced to assent by drawing lots, it is a chance verdict.⁵ So, also, where their assent is obtained by matching coins.⁶

§ 4876. **Misconduct.**—Separation of the jury is not, in the absence of any appearance of prejudice to the party complaining of it, ground for a new trial, or where there is no ground of suspicion that they have been tampered with,⁷ even if verdict be subsequently modified.⁸ Otherwise where there is a suspicion of abuse.⁹ Where a juror drinks liquor as a remedy for disease, after retiring in charge of the officer, a new trial will be granted.¹⁰ And in Arkansas it has been held that the mere fact that one of the jury, during the trial, in company with the officer, visited a saloon and took a glass of liquor, will not be sufficient ground of itself for granting a new trial, unless it appear that the defendant was prejudiced, although such conduct

¹ Donner v. Palmer, 23 Cal. 40.

² Wilson v. Berryman, 5 Cal. 44; Mulocke v. Lawrence, 5 City Hall Rec. 85; Denton v. Lewis, 15 Iowa, 301.

³ Turner v. Tuolumne County Water Co., 25 Cal. 400; Boyce v. Cal. Stage Co., Id. 473; Hoare v. Hindley, 49 Id. 274; see *post*, "Impeaching Verdict."

⁴ Wilson v. Berryman, 5 Cal. 44; Lee v. Clute, 10 Nev. 149; Conklin v. Hill, 2 How. Pr. 6; Fowler v. Colton, Burn. 175; Barton v. Holmes, 16 Iowa, 252.

⁵ Levy v. Brannan, 39 Cal. 485.

⁶ Donner v. Palmer, 23 Cal. 40.

⁷ Ex parte Hill, 3 Cow. 355; People v. Douglass, 4 Id. 26; Everett v. Youella, 4 Barn. & Adol. 681; State v. Barton, 19 Mo. 227; State v. Harlow, 21 Id. 446; State v. Igo, Id. 459; Green v. Bliss, 12 How. Pr. 428; Oliver v. First Presb. Ch., 5 Cow. 283; Smith v. Thompson, 1 Id. 221; Hor-

ton v. Horton, 2 Id. 589; Perkins v. Ermel, 2 Kan. 325; Anthony v. Smith, 4 Bosw. 503; People v. Moore, 41 Cal. 238.

⁸ Nims v. Bigelow, 44 N. H. 376; Nininger v. Knox, 8 Minn. 140.

⁹ Oliver v. First Presb. Ch., 5 Cow. 283.

¹⁰ Brant v. Fowler, 7 Cow. 562; State v. Baldy, 17 Iowa, 39; State v. Bullard, 16 N. H. 139. The propriety of this rule is doubted in Wilson v. Abrahams, 1 Hill, 208; and in Harrison v. Rowan, 4 Wash. C. C. 32, it was held that the mere fact of the jurors having taken refreshments, if not furnished by either party to the suit, was not sufficient ground to set aside the verdict. Nor when prisoner's counsel consented in open court to this indulgence, unless shown that the indulgence was grossly abused, and operated injuriously to the prisoners: United States v. Gibert, 2 Sumn. 19.

is reprehensible.¹ Proof of declarations of juror made after verdict can not be received for the purpose of impeaching it.² A conversation of a juror with any person in regard to the trial, in order to vitiate the verdict, must have been of such a nature as to impress the case on the juror's mind in an aspect different from that presented by the evidence.³ The mere disclosure of the verdict by the juror, after it has been agreed upon, sealed, and delivered to the clerk, although reprehensible, is not sufficient of itself to invalidate the verdict.⁴ The amendment of 1862 to section 193 of the California practice act, allowing the affidavits of the jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trials made after its passage, although the verdict and judgment sought to be set aside were rendered previously.⁵

§ 4877. **Impeaching Verdict.**—Ordinarily the affidavits of jurors are not admissible to impeach their verdict, either for error or mistake in respect to their verdict, nor for irregularity or misconduct of themselves or their fellows,⁶ or to show they intended something different,⁷ except under special circumstances;⁸ as where mistake arises from misdirection of the judge, or conduct equivalent thereto.⁹ But where the foreman of the jury by mistake announces a verdict different from that agreed upon, the affidavit of jurors may be introduced to establish that fact if the application be made at once to the court to correct the record to conform to the actual finding.¹⁰ By the California code of civil procedure, section 657, subdivision 2, the affidavit of a juror may be used to prove a resort to chance in determining the verdict; but this statute, being in derogation of the common law, must be strictly construed, and will not be held to include such kinds of misconduct as do not come clearly within the descriptive terms of the statute.¹¹ But such

¹ *Kee v. State*, 28 Ark. 155; *Roman v. State*, 41 Wis. 312; *Russell v. State*, 53 Miss. 367. But see *March v. State*, 44 Tex. 64.

² *Hollingsworth v. Duane*, Wall. C. C. 174.

³ *March v. State*, 44 Tex. 64; see also *Taylor v. State*, 52 Miss. 84.

⁴ *Ingersoll v. Truebody*, 40 Cal. 603.

⁵ *Donner v. Palmer*, 23 Cal. 40.

⁶ 1 T. R. 11; 2 Id. 281.

⁷ 2 Tidd. 817; *Sargent v. —*, 5 Cow. 121; *Rex v. Woodfall*, 5 Burr. 2667; *Turner v. Tuol. Water Co.*, 25 Cal. 400; *People v. Hughes*, 29 Id. 257; *Boyce v. Cal. Stage Co.*, 25 Id. 473; *Clum v. Smith*, 5 Hill, 560; *Ladd*

v. Wilson, 1 Cranch C. C. 305; *Green v. Bliss*, 12 How. Pr. 428; *Dana v. Tucker*, 4 Johns. 487; *Reins v. People*, 30 Ill. 256; *Brownell v. McEwen*, 5 Denio, 367; *Cline v. Broy*, 1 Or. 89; *People v. Columbia, Com. Pleas*, 1 Wend. 297; *Jackson v. Dickenson*, 15 Johns. 309; *Hughes v. Listner*, 23 Ind. 396; *Edmiston v. Garrison*, 18 Wis. 594; *Taylor v. Everett*, 2 How. Pr. 23.

⁸ *Little v. Birdwell*, 21 Tex. 597.

⁹ *Ex parte Caykendall*, 6 Cow. 53.

¹⁰ *Dalrymple v. Williams*, 63 N. Y. 361; see, further, "Verdict," *ante*.

¹¹ *Turner v. Tuol. Water Co.*, 25 Cal. 400; see also *Hoare v. Hindley*, 49 Cal. 274.

affidavits may be received to show improper conduct of successful party in approaching them on the subject;¹ or they may be introduced to sustain the verdict,² but not to show that they misunderstood its effect.³

§ 4878. **Affidavit on Motion—Ground of Surprise.**

Form No. 1152.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled cause.

II. Previous to the trial of said cause, to wit, on the day of, 18.., at, one M. N. informed me that he knew and would testify to [state a material point in defense], and relying on said assurance I took no steps to procure other testimony to said fact, and summoned the said N. M. to testify to the same, but the said N. M. when called to the stand at the trial of said cause, by collusion with the plaintiff therein [or state any fact or occurrence for which defendant is not responsible], testified contrary to what he had previously stated he should do, and the verdict, which was against the defendant, was mainly attributable to said testimony, and on a new trial [state material point] will be established by evidence, and a different verdict will result.

III. I am able to prove the same fact by O. P., who resides at, and whose testimony I can procure at the new trial of this cause.

[JURAT.]

[SIGNATURE.]

§ 4879. **Affidavit.**—The affidavit on a motion for new trial, on the ground of surprise by non-attendance of witnesses, should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses.⁴ It must set forth due diligence.⁵ The facts constituting legal surprise should be shown by the affidavits of the attorney, and not by the client.⁶ Where the application is on the ground of surprise by the testimony of a witness, the affidavit should show that such testimony is not true.⁷ A new trial will not be granted on affidavit by a witness of mistake in his testimony on the trial, unless there be a clear showing of mistake, and that it was injurious to the

¹ Reynolds v. Champlain Trans. Co., 9 How. Pr. 7.

² Dana v. Tucker, 4 Johns. 487; see also Nesmith v. Clinton Fire Ins. Co., 8 Abb. Pr. 141.

³ Polhemus v. Heiman, 50 Cal. 438.

⁴ Rogers v. Huie, 1 Cal. 429; Warren v. Ritter, 11 Mo. 354.

⁵ Rogers v. Huie, 1 Cal. 429.

⁶ Schellhous v. Ball, 29 Cal. 605.

⁷ People v. Jocelyn, 29 Cal. 562; Phenix v. Baldwin, 14 Wend. 62.

party, and that he had no means or had used due diligence to correct it.¹

§ 4880. **Application, when Made.**—The general rule is, that a party surprised on the trial must apply for relief at the earliest practicable moment, and in such method as will produce the least vexation, expense, and delay; but the rule may be relaxed where the party has been guilty of no laches, and acts in good faith.²

§ 4881. **Grounds of Motion.**—Accident or surprise, such as ordinary prudence could not have guarded against, is a good ground for a motion for a new trial.³ And an order denying new trial on this ground will not be reversed unless there has been an abuse of discretion.⁴ The surprise must be some matter of fact, not of law.⁵ Thus where one party to an action is misled by the act of the other, justice demands that a new trial should be granted.⁶ Where a defendant, whose property has been attached, files an evasive answer under oath, admitting the indebtedness sued on, and then, on a trial between an intervenor and the plaintiff, testifies that the debt was not due, it is sufficient cause for new trial on the ground of surprise.⁷ Where a party to an action, previous to the trial, is told by a witness that he will testify in a certain manner to a material fact, and relying on his statement, neglects to procure other testimony, and when called to the stand, the witness, either by collusion, or by any occurrence for which the party calling the witness is not responsible, testifies contrary to what he had previously stated, it is surprise in the sense in which the word is used, provided the party shows that he will be able on the new trial to supply the testimony required.⁸ Where it clearly appears that a witness has made a mistake in his testimony upon a material point which was in its nature calculated to and probably did decide the verdict, a new trial will be granted;⁹ but not where the witness acknowledging the mistake is only one of several who testify to the same point.¹⁰ Where defendant testified to

¹ *Howe v. Briggs*, 17 Cal. 385.

² *Delmas v. Martin*, 39 Cal. 555.

³ *Patterson v. Ely*, 19 Cal. 28; *Cook v. De la Guerra*, 24 Id. 237; *Brooks v. Lyon*, 3 Id. 113; *Moore v. L. A. Infirmary*, 49 Id. 669; *People v. Marks*, 10 How. Pr. 261; *De Leyer v. Michaels*, 5 Abb. Pr. 203; *Peck v. Hiler*, 30 Barb. 655.

⁴ *Nooney v. Mahoney*, 30 Cal. 226.

⁵ *Craig v. Fanning*, 6 How. Pr. 336.

⁶ *Pinkham v. McFarland*, 5 Cal.

137; *Jackson v. Warford*, 7 Wend. 62; *Chamberlain v. Lindsay*, 1 Hun, 231; *Haynes v. State*, 45 Ind. 424; *Marsh v. State*, 44 Tex. 64; but see *Jackson v. Van Antwerp*, 8 Cow. 273; *Taylor v. Harlow*, 11 How. Pr. 285.

⁷ *Coghill v. Marks*, 29 Cal. 673.

⁸ *Rodriguez v. Comstock*, 24 Cal. 25.

⁹ *Coddington v. Hunt*, 6 Hill, 595; *Richardson v. Fisher*, 1 Bing. 145.

¹⁰ *Mersereau v. Pearsall*, 6 How. Pr. 293.

payment, and plaintiff after such testimony had no time to produce evidence, but afterwards found witnesses who, refreshing their memory from an examination of plaintiff's books, could testify as to what took place at the time and place of the alleged payments, in disapproval of defendant's testimony, it was held good ground for a new trial for surprise and newly discovered evidence.¹ If a witness absent himself after he has appeared, so that he can not be examined, it is a surprise, and is ground for a new trial.² If documents were ruled out which had been read without objection on a former trial, it is a surprise, and good ground for a new trial.³ And where seduction was sworn to on a certain day, not mentioned in the complaint, and on which day the defendant was able to prove an *alibi*, by witnesses who were not present at the trial, a new trial was granted.⁴ Where in a suit for damages in which the defendant answers denying damage in the amount claimed, the court enters judgment for damages, *non obstante veredicto*, after plaintiff had gone into proof as to damages, and the jury had returned a verdict upon the facts for a less amount than that claimed, and less than the amount for which judgment was rendered, it was held that going into proof, etc., might well have induced defendant not to move to amend his answer, which motion the court would probably have granted, and hence defendant might have been taken by surprise.⁵ Where plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial.⁶ Where defendant had a good defense, but was prevented from making it by accident, and without fault on his part, a new trial will be awarded.⁷ But where a party lost his opportunity of defense by his own negligence, a new trial will not be granted.⁸ So, on a misdirection of the court in a matter not material to the merits of the cause.⁹

§ 4882. **Insufficient Grounds.**—If the party alleging surprise “can relieve himself from embarrassment in any mode, either by nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict,

¹ Parshall v. Klinck, 43 Barb. 203; but see Berry v. Metzler, 7 Cal. 418, where it is held to be only ground for a continuance.

² Tilden v. Gardiner, 25 Wend. 663; Ruggles v. Hall, 14 Johns. 112.

³ Helm's Ex'rs v. Jones' Adm'x, 9 Dana (Ky.), 26.

⁴ Sargent v. Dinnison, 5 Cow. 106.

⁵ Reniff v. The Cynthia, 18 Cal. 669.

⁶ Eagan v. Delaney, 16 Cal. 85.

⁷ Ford v. Ford, Walker (Miss.), 505.

⁸ Dodge v. Strong, 2 Johns. Ch. 228; Dorflinger v. Coil, 2 Ham. 311; Hoomes v. Kuhn, 4 Call, 274; Green v. Robinson, 5 How. (Miss.) 80.

⁹ Maynor v. Lewis, 2 Ga. Dec. 205.

but must at once fortify his position by resorting to all available modes of present relief.¹ A party will not be refused a new trial because when taken by surprise at unexpected testimony he did not ask for a continuance, if he had no knowledge at the time of evidence to rebut such testimony.² Want of preparation is a ground for continuance, but no ground for a new trial.³ So where a witness absents himself without leave, and no attachment is asked for, it is no ground for a new trial.⁴ Mere surprise at the evidence given by the witnesses of the defendant or of the adverse party is not sufficient ground for a new trial.⁵ Or because witness did not state facts which the party expected they would state.⁶ Especially where it is not shown that proof can be made upon another trial of the facts, of which the want of proof occasioned the surprise.⁷ Nor where the plaintiff, testifying in his own behalf, sustains the averment of his own complaint.⁸ Surprise at the testimony of a witness in stating a certain conversation incorrectly is no ground for a new trial.⁹ A party can not be surprised by his opponent making good by proof the allegations of his plea.¹⁰ Nor at the ruling of the court on the admission of testimony.¹¹ Nor that the attorney was mistaken as to the time of the meeting of the court, and was therefore not present.¹² The plaintiff can not be heard to complain of surprise at the requirement of evidence on his part clearly called for by the issues; even though he was led by the defendant (without fraud) to suppose that the fact in issue would be admitted.¹³ A party can not have a new trial on this ground, to enable him to rebut testimony, which he was aware before the former trial might be introduced.¹⁴ Nor that the party was surprised in a matter of law.¹⁵ Nor that a party had given the suit no further attention, having instructed his attorney to accept compromise.¹⁶ Nor that the party was mistaken as to the nature of his case.¹⁷ Nor the unexpected close of plaintiff's

¹ Schellhous v. Ball, 29 Cal. 608; Ames v. Howard, 1 Sumn. 482; Carr v. Gale, 1 Curt. C. C. 384.

² Alger v. Merritt, 16 Iowa, 121.

³ Turner v. Morrison, 11 Cal. 21; Stout v. Calver, 6 Mo. 254; Jackson v. Roe, 9 Johns. 77.

⁴ Stewart v. Small, 5 Mo. 525.

⁵ Live Yankee Co. v. Oregon Co., 7 Cal. 42; Taylor v. California Stage Co., 6 Id. 228; Shepard v. Citizens' Ins. Co., 8 Mo. 272; Beach v. Tooker, 10 How. Pr. 297.

⁶ Martin v. Clark, Hempst. 259.

⁷ Mayfield v. State, 44 Tex. 59.

⁸ Cox v. Hutchings, 21 Ind. 219; Peck v. Hersley, Id. 344.

⁹ Klockenbaum v. Pierson, 22 Cal. 160.

¹⁰ Armstrong v. Davis, 41 Cal. 494.

¹¹ Fuller v. Hutchings, 10 Cal. 523.

¹² Steigers v. Darby, 8 Mo. 679.

¹³ Taylor v. Harlow, 11 How. Pr. 285.

¹⁴ Meakim v. Anderson, 11 Barb. 215; Blake v. Madigan, 65 Me. 522; Knapp v. Fisher, 49 Vt. 94.

¹⁵ Hite v. Lenhart, 7 Mo. 22.

¹⁶ Patchin v. Wegman, 19 Mo. 151.

¹⁷ Robbins v. Alton Ins. Co., 12 Mo. 380.

case.¹ If a mistake of law can ever be made the means of obtaining a new trial on the ground of surprise, it certainly can not when it is caused by the negligence of such party.² A new trial will not be granted on the ground of surprise caused by the rejection of evidence, when such evidence would not, in the judgment of the court, have varied the result.³ The introduction of false evidence relating solely to a point not necessarily involved in the decision of the action is no ground for a new trial.⁴ Surprise at the admission of a witness, because his attorney had advised him that the witness was incompetent, is no ground for a new trial.⁵ The mistake of counsel as to competency of a witness is no ground for a new trial.⁶ Nor as to what witnesses would testify.⁷ Mere surprise at the result of a trial is no ground for a new trial.⁸

§ 4883. **What must be Shown**—The cases establish that the party must prove the surprise, how he was injured by it, and that no laches are justly attributed to him;⁹ that the surprise has not resulted from the fault or negligence of the moving party;¹⁰ and that the verdict is mainly attributable to the facts out of which the surprise resulted;¹¹ and that he has a valid defense, and that on new trial the result may be different.¹²

§ 4884. **Affidavit on Motion—Ground of Newly Discovered Evidence.**

Form No. 1153.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. Subsequent to the trial of said cause, to wit, on the day of, 18.., I have discovered evidence which will establish the fact [state a fact material to the issue]; that said evidence is new, material to the issue, and not cumulative, nor will it be brought to impeach any evidence or the

¹ Wells v. Sanger, 21 Mo. 354.

² People v. O'Brien, 4 Park. Cr. 203.

³ Foote v. Silsby, 1 Blatchf. 445.

⁴ Guy v. Hanly, 21 Cal. 397.

⁵ Klockenbaum v. Pierson, 22 Cal. 160.

⁶ Packer v. Heaton, 9 Cal. 568.

⁷ Robbins v. Alton Ins. Co., 12 Mo. 380.

⁸ Lane v. Brown, 22 Ind. 239.

⁹ Brooks v. Douglass, 32 Cal. 208; Patterson v. Fly, 19 Id. 28; Stephens v. Chiles, 1 A. K. Marsh. 334; Blythe v. Sutherland, 3 McCord, 258; Libentz's Adm'r v. Greenland, 2 Id. 313;

Smith v. Morrison, 3 A. K. Marsh. 81; McFarland's Adm'r v. Clark, 9 Dana, 134.

¹⁰ Rogers v. Huie, 1 Cal. 429; Schellhous v. Ball, 29 Id. 605; Whetmore v. Murdock, 3 Woodb. & M. 380; Henckley v. Hendrickson, 5 McLean, 170; Snowhill v. Knapp, 7 N. Y. Lcg. Obs. 15.

¹¹ Schellhous v. Ball, 29 Cal. 605; People v. Mack, 2 Park. Cr. 673; De Leyer v. Michaels, 5 Abb. Pr. 203; Hartwright v. Badham, 11 Price, 383.

¹² Cook v. De la Guerra, 24 Cal. 237; McClusky v. Gerhauser, 2 Nev. 47.

testimony of any witness who has been heretofore examined in the said action.

III. I did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence [or the utmost diligence] have discovered and produced the same upon the former trial.

[JURAT.]

[SIGNATURE.]

§ 4885. **Affidavit.**—Newly discovered evidence relied on to obtain a new trial has no place in a statement. It should be presented in affidavits.¹ Motions for new trial, on the ground of newly discovered evidence, must be regarded with suspicion and disfavor. In such cases the motion must be supported by the affidavit of the moving party that he did not know the newly discovered evidence;² and usually by the affidavits of the newly discovered witnesses, showing what they know and will testify;³ and should be free from the suspicion of bad faith.⁴ The affidavit of the party can not be received in lieu of the affidavits of such witnesses, unless for good cause shown it appears that the affidavits of the latter can not be obtained in time, or in such further time as may have been granted for that purpose.⁵ Witness's affidavit must be produced, or proof that it can not be obtained;⁶ or a sufficient excuse be furnished for its absence;⁷ or time be obtained for its production.⁸ The best possible proof must be adduced of the existence of the newly discovered evidence.⁹ If the affidavit states that the new witness merely "told" the party the facts relied on, it is insufficient.¹⁰

§ 4886. **Diligence must be Shown.**—To justify a new trial on this ground, it must be shown that the party moving used reasonable diligence to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own laches;¹¹ that the strictest diligence is required, and

¹ Beans v. Emanuelli, 36 Cal. 117.

² Baker v. Joseph, 16 Cal. 180; Arnold v. Skaggs, 35 Id. 684.

³ Hare v. Sproul, 2 How. (Miss.) 772.

⁴ Merk v. Gelzhauser, 50 Cal. 631.

⁵ Arnold v. Skaggs, 35 Cal. 684.

⁶ Rogers v. Huie, 1 Cal. 433; Jenny Lind Co. v. Bower, 11 Id. 194; Case v. Coddling, 38 Id. 194; Den v. Morrell, 1 Hall, 382; Smith v. Cushing, 18 Wis. 295.

⁷ Smith v. Cushing, 18 Wis. 295.

⁸ Jenny Lind Co. v. Bower, 11 Cal. 194.

⁹ Smith v. Cushing, 18 Wis. 295.

¹⁰ Shumway v. Fowler, 4 Johns. 425.

¹¹ Butler v. Vassault, 40 Cal. 74; Arnold v. Skaggs, 35 Id. 684; Baker v. Joseph, 16 Id. 173; Howard v. Winters, 3 Nev. 539; Williams v. Baldwin, 18 Johns. 489; Vandervoort v. Smith, 2 Cal. 155; Palmer v. Mulligan, 3 Id. 307; Jackson v. Malin, 15 Johns. 293; People v. Mack, 2 Park. Cr. 673; People v. N. Y. Superior Court, 10 Wend. 285; Macy v. De Wolf, 3 Woodb. & M. 193; Aiken v. Bemis, Id. 348; Whetmore v. Murdock, Id. 380; People v. Sup. Ct., 5 Wend. 115; Grah. & Wat. on New

that the evidence will change the result, where the evidence is merely cumulative.¹ And the application should state what diligence was used;² absence from state being no excuse for want of diligence.³ Diligence or the want of it in a particular case depends in a great degree upon the circumstances surrounding the parties and the conduct of the cause, which are peculiarly within the knowledge of the trial court, and its action will rarely be interfered with on appeal.⁴ A new trial will not be granted when the discovered evidence is alleged to be a deed recorded in the county recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried.⁵ If materiality is discovered during trial, continuance should be asked for, or new trial will be refused.⁶ But where a witness on the former trial did not disclose all the knowledge he had relative to the facts, it is not ground for a new trial.⁷

§ 4887. **Evidence must not be Cumulative.**—It must be shown that it is new material, and not cumulative.⁸ If merely cumulative, it is no ground for a new trial.⁹ There is no presumption that newly discovered evidence is cumulative; and if

Trial, 489; *Leavy v. Roberts*, 8 Abb. Pr. 310; S. C., 2 Hilt. 285; *Fellows v. Emperor*, 13 Barb. 92; *People v. Marks*, 10 How. Pr. 261; *De Lima v. Glassell*, 4 Hen. & M. 369; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Campbell v. Genet*, 2 Hilt. 290; *Washburn v. Gould*, 3 Story C. C. 122; *Palmer v. Fisk*, 2 Curt. C. C. 14; *Prevost v. Gratz*, Pet. C. C. 364; *Garrison v. United States*, 2 Ct. of Cl. (Nott & H.) 382; *Fikes v. Bentley*, Hempst. 61; *Dickson v. Mathers*, Id. 65; *Coote v. Bank of United States*, 3 Cranch C. C. 95; *Leschi v. Ter. of Wash.*, Wash. Ter. 23; *Nininger v. Knox*, 8 Minn. 140; *Arthur v. Chavis*, 6 Rand. 142; *Doubleday v. Makepeace*, 4 Blackf. 9; *Carson v. Cross*, 14 Iowa, 463.

¹ *Levitsky v. Johnson*, 35 Cal. 41.

² *Burnley v. Rice*, 21 Tex. 171; *Edmiston v. Garrison*, 18 Wis. 594.

³ Id.

⁴ *Jones v. Singleton*, 45 Cal. 94; see also *Brown v. Luehrs*, 79 Ill. 575.

⁵ *Weimer v. Lowery*, 11 Cal. 104. *Vardeman v. Edwards*, 21 Tex. 737.

⁶ *Berry v. Metzler*, 7 Cal. 418; *Klockenbaum v. Pierson*, 22 Id. 160.

⁷ *Davis v. Presler*, 5 Smed. & M. 459; *Phillips v. Ocmulgee Mills*, 55 Ga. 633.

⁸ *Bartlett v. Hogden*, 3 Cal. 55; *Reed v. Clark*, 47 Id. 194; *Live Yankee Co. v. Oregon Co.*, 7 Id. 42; *Taylor v. Cal. Stage Co.*, 6 Id. 228; *Gaven v. Dopman*, 5 Id. 342; *Klockenbaum v. Pierson*, 22 Id. 160; *Spencer v. Doane*, 23 Id. 418; *Aldrich v. Palmer*, 24 Id. 513; *Cutler v. Steamer Columbia*, 1 Or. 101; *Howard v. Winters*, 3 Nev. 539.

⁹ See above authorities; also *Levitsky v. Johnson*, 35 Cal. 41; *Stoakes v. Monroe*, 36 Id. 383; *Cox v. Hutchings*, 21 Ind. 219; *Sturgeon v. Ferron*, 14 Iowa, 160; *Wilhelmi v. Thorington*, Id. 537; *Fleming v. Hollenback*, 7 Barb. 271; *People v. N. Y. Sup. Ct.*, 10 Wend. 285; *Pike v. Evans*, 15 Johns. 210; *Steinbach v. Columbia Ins. Co.*, 2 Cai. 129; *Edmiston v. Garrison*, 18 Wis. 594; *State v. Stumbo*, 26 Mo. 306; *State v. Wightman*, 27 Id. 121; *Whitbeck v. Whitbeck*, 9 Cow. 266; *Brisbane v. Adams*, 1 Sandf. 195; *Burnett v. Phalon*, 4 Bosw. 622; *Leavy v. Roberts*, 2 Hilt. 285; *Aiken v. Bemis*, 3 Woodb. & M. 348; *Wheelwright v. Beers*, 2 Hall, 391; *Nason v. Cockroft*, 3 Duer, 366; *Peck v. Hiller*, 30 Barb. 655; *Adams v. Bush*, 23 How. Pr. 262; *Macy v. De Wolf*, 3 Woodb. & M. 193; *Ames v. Howard*, 1 Sumn. 482.

it does not appear to be so in the moving papers, the fact must be shown by the party opposing the motion, or he can not complain.¹ Newly discovered cumulative evidence furnishes no ground for a new trial, unless it is of so controlling a character that it would probably change the verdict.² The best definition of the term "cumulative evidence" is that in *Parker v. Hardy*, 24 Pick. 246, viz.: "Cumulative evidence is additional evidence of the same kind to the same point."³ That only is cumulative which is in addition to or corroborative of what has been given at the trial.⁴ Evidence is cumulative if it supports evidence introduced on the trial to prove facts of secondary importance, the tendency of which was to prove the facts in issue.⁵ But if it would bring to light some new fact bearing upon the main issue, it is not cumulative.⁶ Evidence upon some fact which is specifically distinct, and bears upon the issue, is not cumulative, though it may be intimately connected with parts of the other testimony.⁷ So proof that plaintiff had acknowledged settlement of the demand should not be deemed cumulative.⁸ Nor in case of crim. con., proof that plaintiff had for some time been living in adultery.⁹

§ 4888. **Must not be Impeaching.**—It must be shown that it is not to impeach an adverse witness. It must go to the merits of the case, and not be such as tends merely to discredit a witness;¹⁰ except in very rare cases, such as where the whole question is one of identity of persons long deceased. To give an opportunity of impeaching the character of a principal witness,¹¹ or where in a criminal case the affidavit of the principal witness stated that her evidence given on the trial was incorrect, and her mother stated in an affidavit that she was unreliable,¹² new evidence on points formerly in issue must be of preponderating character, and decisive on the evidence to be

¹ *Hobler v. Cole*, 49 Cal. 250.

² *Wintham County Bank v. Kendall*, 7 R. I. 77; *State v. O'Brien*, Id. 336; *Heaton v. Manhattan Ins. Co.* Id. 502.

³ *Bradish v. State*, 35 Vt. 452.

⁴ *Gray v. Harrison*, 1 Nev. 502.

⁵ *Stoakes v. Monroe*, 36 Cal. 383; *Gray v. Harrison*, 1 Nev. 502.

⁶ *Gray v. Harrison*, 1 Nev. 502.

⁷ *Alger v. Merritt*, 16 Iowa, 121; *Stineman v. Beath*, 36 Id. 73; *German v. Maquoketa Savings Bank*, 38 Id. 368; *Wilson v. Plank*, 41 Wis. 94.

⁸ *Gayott v. Butts*, 4 Wend. 579.

⁹ *Smith v. Masten*, 15 Wend. 270.

¹⁰ *Baker v. Joseph*, 16 Cal. 180;

Klockenbaum v. Pierson, 22 Id. 160; *Deer v. State*, 14 Mo. 348; *Meakin v. Anderson*, 11 Barb. 215; *Beach v. Tooker*, 10 How. Pr. 297; *Simmons v. Fay*, 1 E. D. Smith, 107; *Carr v. Gale*, 1 Curt. C. C. 384; *United States v. Potter*, 6 McLean, 182; *Brooke v. Payton*, 1 Cranch C. C. 128; *Terr. of Oregon v. Latshaw*, 1 Or. 146; *Barrett v. Belshe*, 4 Bibb, 348; *Harrington v. Bigelow*, 2 Denio, 109; *Fleming v. Hollenback*, 7 Barb. 271; *Shumway v. Fowler*, 4 Johns. 425.

¹¹ *Jackson v. Kinney*, 14 Johns. 186; *Jackson v. Hooker*, 5 Cow. 207.

¹² *Mann v. State*, 44 Tex. 642.

overturned.¹ But where the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery.² Where the plaintiff in ejectment recovers on a paper title and defendant discovers after the trial that plaintiff had conveyed his title to a third person before the commencement of the suit, a new trial should be granted.³ But where the defense was forgery in an action on a note, a new trial was granted on the ground that the note, which at the time of the trial was lost, had since been found.⁴ Admissions and conversations of a defendant, the purport of which is in direct conflict with his testimony in the case, and with the theory of his defense, are not impeaching but original evidence.⁵

§ 4889. **Must be Material.**—It must be shown that it is material to the issue; and of so important a character as to satisfy the court that it may reasonably be inferred the verdict would have been different if it had been in on the former trial;⁶ or that it would materially vary the complexion of the cause.⁷ Where a referee, after report had been made up, refused, from doubt as to his powers, to allow the introduction of newly discovered evidence, at the same time intimating in a supplemental report that if such evidence had been adduced on the trial the result would probably have been different, it was held to be good ground for a new trial.⁸

§ 4890. **Must be Subsequently Discovered.**—The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient.⁹ A new trial for this cause is never granted if the existence of the new evidence was known to the applicant before the trial was had;¹⁰ even though he had forgotten it at the time of the trial,¹¹ and though it was unknown to his counsel until after the trial.¹² Newly discovered testimony, consisting of facts within the knowledge of witnesses called by the movant and examined on the trial, will not authorize a new trial.¹³

¹ Finley v. Tyler, 3 Mon. 400.

² Wright v. Carillo, 22 Cal. 595.

³ Craumer v. Porter, 41 Id. 462.

⁴ Platt v. Munroe, 34 Barb. 291.

⁵ Alger v. Merritt, 16 Iowa, 121.

⁶ Stokes v. Monroe, 36 Cal. 383; State v. Locke, 26 Mo. 603; Varde-man v. Edwards, 21 Tex. 737.

⁷ Levitsky v. Johnson, 35 Cal. 41; United States v. Cornell, 2 Mason, 91; Ludlow v. Parker, 4 Ham. 5.

⁸ Hoyt v. Saunders, 4 Cal. 345.

⁹ Arnold v. Skaggs, 34 Cal. 684.

¹⁰ Jackson v. Main, 15 Johns. 293; Vendervoort v. Smith, 2 Cal. 155; Macy v. De Wolf, 3 Woodb. & M. 193; Whetmore v. Murdock, Id. 380.

¹¹ Fleming v. Hollenback, 7 Barb. 271; People v. Sup. Ct., 10 Wend. 285.

¹² Young v. State, 56 Ga. 403.

¹³ Philipps v. Ocmulgee Mills, 55 Ga. 653; Archer v. Heidt, Id. 200;

§ 4891. **When New Trial Denied.**—New trial will not be granted if the witnesses whose testimony is sought to be introduced are unworthy of belief;¹ nor if it is improbable that they could be obtained at the new trial.² In contesting a motion for a new trial on the ground of newly discovered evidence, it is competent for the adverse party to show by affidavit that the witness whose testimony is stated is wholly unworthy of credit.³ Where the affidavit on which the application is made is shown by counter-affidavits to be open to the suspicion of bad faith, and it also fails to raise a reasonable presumption that the new evidence, if produced, would change the result, a new trial will be denied.⁴ On a conviction for larceny a new trial will not be granted to allow the prisoner to introduce evidence that the stolen property did not belong to the person named in the indictment.⁵

§ 4892. **Motion on Statement, etc.**—When the application for a new trial is made for any other cause than those named in the first four subdivisions of the notice, that is, when it is made on the ground of excessive damages, insufficiency of the evidence to justify the verdict, etc., or for error in law occurring at the trial and excepted to by the party making the application, it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case.⁶ In such cases probably the more frequent practice is to move on the statement of the case; though in some instances a bill of exceptions takes its place.

§ 4893. **Bill of Exceptions.**—If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided,⁷ the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as provided after the entry of judgment, or after receiving notice of such entry, and a bill shall be prepared and settled in like manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.⁸ A bill of exceptions on a motion for a new trial on the ground of insufficiency of the evidence should specify the particulars wherein it is insufficient.⁹

Gautier v. Douglass Manufacturing Co., 52 How. Pr. 325.

¹ Cole v. Cole, 50 How. Pr. 59; Fleming v. Hollenback, 7 Barb. 271; Macy v. De Wolf, 3 Woodb. & M. 193; Williams v. Baldwin, 18 Johns. 489; see Pomeroy v. Columbian Ins. Co., 2 Cai. 260.

² Kendrick v. Delafield, 2 Cai. 67.

³ Williams v. Baldwin, 18 Johns. 489.

⁴ Merk v. Gelzhauser, 50 Cal. 631; see also Cole v. Cole, 50 How. Pr. 59.

⁵ Foster v. State, 52 Miss. 695.

⁶ Cal. Code C. P., sec. 658.

⁷ See *ante*, "Exceptions."

⁸ Cal. Code C. P., sec. 659, subd. 2.

⁹ Martin v. Matfield, 49 Cal. 45; Cal. Code C. P., sec. 648; see *ante*, "Exceptions," as to manner of taking and settling bill.

§ 4894. **Minutes of the Court.**—When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain such specifications, when the motion is made on the minutes of the court, it must be denied.¹ As a statement has to be subsequently prepared in such cases in order to appeal from the order of the court,² the practice of moving on the minutes of the court is not common, but the statement is prepared for the hearing of the motion for a new trial; and the statement is then used on the appeal.

§ 4895. **Statement, Preparation of.**—If the motion is to be made upon a statement of the case, the moving party must, within ten days after the service of the notice or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare a draft of the statement, and serve the same or a copy thereof upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same or a copy thereof upon the moving party.³ The evidence should be presented in a narrative form, or by statement of its substance, or what it tended to prove.⁴ The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section 193 of the practice act,⁵ and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial.⁶ Matters which do not seem to illustrate the point, such as verifications, acknowledgment of deeds, and titles of courts, should be omitted,⁷ substituting the words “duly verified,” “duly acknowledged,” “title of cause,” etc.⁸ But a skeleton statement containing the words “[here insert deed, etc.],” describing it, without consent of parties, will be stricken from the transcript,⁹ and the court will not consider the questions which it is intended to present.¹⁰

¹ Cal. Code C. P., sec. 659, subd. 4.

² See Cal. Code C. P., sec. 661.

³ Cal. Code C. P., sec. 659, subd. 3.

⁴ People v. Getty, 49 Cal. 581.

⁵ Cal. Code C. P., sec. 657.

⁶ Harper v. Minor, 27 Cal. 109.

⁷ Estate of Boyd, 25 Cal. 513.

⁸ Id.; Mariner v. Smith, 27 Cal. 654; Provost v. Piper, 9 Id. 552.

⁹ Kimball v. Semple, 31 Cal. 657.

¹⁰ Bush v. Taylor, Cal. 112.

Nor will a mandate lie to compel the clerk of the lower court to certify such a statement, or to engross it, inserting the omitted documents in their proper places.¹ It is seldom necessary to insert an entire deed; it is sufficient to say that a deed was introduced from A. to B., showing that A.'s title has vested in B.² They may be inserted in the transcript, if they are mentioned in the statement as having been in evidence, with a certificate of the judge that it was before him on motion for a new trial.³ Transcripts of records and deeds, where no point is made on the construction of the language, may be referred to by a brief statement.⁴ Where documentary evidence is referred to, the appellant can not insert copies of the same in the transcript on appeal without the assent of the other party, unless the statement has been engrossed and settled and afterwards authenticated, or unless the originals are on file and form part of the records.⁵ Where the admission in evidence of a judgment roll is relied upon as error, the statement should contain either the record or paper so admitted, or a settled abstract thereof, in order that the court may judge of its admissibility.⁶ And if a party relies on the insufficiency of the evidence, and a statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the case necessary to explain the points involved, and that no different case would be presented as to such points had all omitted evidence been inserted.⁷ The reporter's notes do not constitute a statement, and can not be considered on appeal.⁸ The specification of particulars or errors should be made a part of the proposed statement, for without it neither the adverse party nor the judge can well know how much of the evidence should be set forth.⁹

§ 4896. **Specification of Particulars.**—When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will

¹ *People v. Bartlett*, 40 Cal. 142.

² *Kimball v. Semple*, 31 Cal. 657.

³ *Hess v. Winder*, 30 Cal. 349.

⁴ *Knowles v. Inches*, 12 Cal. 212.

⁵ *Kimball v. Semple*, 31 Cal. 657.

⁶ *Doyle v. Franklin*, 48 Cal. 537.

⁷ *Abbey Homestead Ass'n v. Willard*, 48 Cal. 615.

⁸ *People v. Armstrong*, 44 Cal. 327.

⁹ *Barrett v. Tewksbury*, 15 Cal. 354.

rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion.¹ The specifications should be contained in the statement; it is not sufficient that they are upon an annexed, unsigned paper.² It constitutes the basis of the statement, and if wanting, the statement should be disregarded.³ No point will be considered unless it is specified.⁴ If a paper purporting to be a statement on motion for a new trial does not contain a specification of the particular grounds relied on, there is no such statement as is required by statute, and nothing on which the court can act.⁵

A specification of the particular grounds of error is the essential element of a statement;⁶ and all errors to which objection is made on motion for a new trial should be specified;⁷ as that the suit is barred by a former adjudication, between the same parties, upon the same subject-matter; that the cause of action is barred by the statute of limitations; that the property in question was the separate property of the wife. So an erroneous instruction may be assigned as error, if there be any evidence rendering it pertinent to the issue;⁸ and may be stated thus: that the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question.⁹ So as to other errors of law.¹⁰ The error must be specified, if there is but one question of error that could be raised.¹¹ If, at the close of a statement on motion for new trial, the moving party says that he "will rely, on the argument of the motion for new trial in this cause, upon the following grounds," and then enumerates his grounds, he will be considered as abandoning all the grounds not enumerated.¹² It is not enough that in the history of a case exceptions appear scattered here and there through a statement made on motion for new trial, but it is necessary in the statement to specify the particular errors upon which the party will rely.¹³ Specifications of the "particulars in which the court erred" can not be considered as specifications of the particulars wherein the evidence was insufficient. Nor is it an error of law that the evidence is insufficient to justify a particular finding of fact.¹⁴

¹ Cal. Code C. P., sec. 659, subd. 3.

² *Spencer v. Long*, 39 Cal. 700.

³ *Id.*; *Elder v. Shaw*, 12 Nev. 78.

⁴ *Hawkins v. Abbott*, 40 Cal. 639.

⁵ *Hutton v. Reed*, 25 Cal. 478; *Walls v. Preston*, *Id.* 59.

⁶ *Hutton v. Reed*, 25 Cal. 483; *Partidge v. San Francisco*, 27 *Id.* 415.

⁷ *Crowther v. Rowlandson*, 27 Cal. 376; *Burnett v. Pacheco*, *Id.* 408.

⁸ *Barrett v. Tewksbury*, 15 Cal. 359.

⁹ *Id.*

¹⁰ *Alegro v. Duncan*, 24 How. Pr. 210.

¹¹ *Zenith Gold and S. Min. Co. v. Irvine*, 32 Cal. 302.

¹² *Beans v. Emanuelli*, 36 Cal. 117.

¹³ *Id.*

¹⁴ *Smith v. Christian*, 47 Cal. 18.

The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points specified;¹ but evidence not bearing on those points should be excluded.² It is presumed that the statement on motion for a new trial contains all the evidence pertinent to the motion.³ In Nevada, however, it has been uniformly held that an order denying a motion for new trial on the ground of insufficiency of evidence was proper, where the motion was made on a statement failing to show expressly that all the evidence was before the court; and where a new trial was granted by the court below on such a defective statement, the order was reversed.⁴

An application on the ground of error in instructions must point out with reasonable certainty and particularity the error complained of.⁵ Error in disregarding the evidence offered by defendant to show the title to the lands in dispute to be in him, and in sustaining either or any of the objections made by the plaintiff to the admissibility of said evidence, or any part thereof, is a defective specification, and the form disapproved, but the point was considered under the peculiar circumstances of the case.⁶ The findings of the court need not be embodied in the statement or bill of exceptions.⁷ But if a new trial is applied for on the ground that the findings are against the evidence, a specification of the particulars in which each finding is deemed against the evidence is necessary.⁸

§ 4897. **Settlement of Statement.**—If no amendments are served within the time designated, or if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. If amendments are proposed and adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or delivered to the clerk of the court for the judge.⁹ If not adopted, the proposed statement and amendments shall, within ten days thereafter (*i. e.*, after the service of the amendments), be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for

¹ Hutton v. Reed, 25 Cal. 483; Mc-Minn v. Whelan, 27 Id. 319.

² Harper v. Minor, 27 Cal. 107; Estate of Boyd, 25 Id. 513.

³ Clark v. Gridley, 35 Cal. 398; Hidden v. Jordan, 28 Id. 301; Abbey Homestead Ass'n v. Willard, 48 Id. 614.

⁴ Libby v. Dalton, 9 Nev. 23.

⁵ Estep v. Larsh, 21 Ind. 183; Peck v. Hensley, Id. 344.

⁶ Sharp v. Lumley, 34 Cal. 611.

⁷ Reynolds v. Harris, 8 Cal. 618.

⁸ Le Roy v. Rogers, 30 Cal. 229.

⁹ Cal. Code C. P., sec. 659, subd. 3.

the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exception.¹ If the action was heard by a referee, the statement shall be settled by him as prescribed in that section.²

§ 4898. **Duty of Judge on Settlement.**—It is the duty of the judge, or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement.³ If the motion be made on the minutes of the court and a statement be afterwards prepared, it shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.⁴ When settled the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed.⁵ The parties may, by stipulation, waive the signature of the judge or referee.⁶ Judges, judicial officers, and the supreme court possess, respectively, the same power in settling and certifying statements as is conferred upon them in settling and certifying bills of exceptions in this section.⁷ The court below loses jurisdiction to settle and allow a statement on motion for a new trial after appeal taken.⁸

§ 4899. **Filing Statement.**—When settled and certified by the judge or referee, the statement must be filed with the clerk.⁹ The practice in Nevada differs from that in California.¹⁰ Under the Nevada statute, it has been held that the objection that the statement was not filed in time could not be raised on appeal unless it had been made on the hearing of the motion below.¹¹ And an order extending the time to file the statement must either be filed with the papers of the case or entered on the minutes of the court within the time prescribed by statute.¹² Under the former California statute it was held that a stipulation by counsel to the correctness of a statement, and “waiving all informalities in respect to filing and service of the same,” made on the day when it should have been filed, did not justify the moving party in neglecting to file the statement for five

¹ Cal. Code C. P., sec. 650.

² Id., sec. 659, subd. 3. See *ante*, “Exceptions.”

³ Cal. Code C. P., sec. 659, subd. 3.

⁴ Id., sec. 661.

⁵ Id., sec. 659, subd. 3.

⁶ *Sarver v. Garcia*, 49 Cal. 218.

⁷ Cal. Code C. P., sec. 653. See *ante*, “Exceptions.”

⁸ *Thomas v. Sullivan*, 11 Nev. 280.

⁹ Cal. Code C. P., sec. 659, subd. 3.

¹⁰ See Stat. Nev., sec. 197.

¹¹ *Twist v. Kelly*, 11 Nev. 377.

¹² *Clark v. Strouse*, 11 Nev. 76.

months afterwards; and that such neglect was a waiver of the right to move for a new trial.¹ And although the objection might be waived by the adverse party, the party urging such waiver must make it affirmatively appear.²

§ 4900. **Statement on Motion for New Trial.**

Form No. 1154.

[TITLE.]

This is an action of ejectment for a parcel of land described in the complaint herein [being a portion of a tract of land chains square, called the claim, lying on the north side of the road leading from to].

The cause, being regularly called, was tried before the court without a jury, on the day of, 18.. The defendant moved for a judgment on the pleadings, which motion was denied, and thereupon the following evidence was introduced:

M. N., called and sworn for plaintiff, testified as follows, etc. [insert testimony in a narrative form, or its substance].

Cross-examined, etc.

O. P., called and sworn for plaintiff, testified as follows, etc. [insert testimony].

Cross-examined, etc.

Book of surveys shown witness, and identified. Plat in said book introduced. Deed [state parties and contents] shown witness; knows the signature. Deed offered in evidence, defendant objected [state grounds of objection]; objection overruled, and deed introduced marked "Exhibit No. 1;" defendant excepted.

Cross-examined, etc.

Recalled, examined, says, etc.

Cross-examined, says, etc.

It was here admitted that [state admission]; the plaintiff offered and read in evidence a deed marked "Exhibit No. 2," dated, from to, for [the land in contest]; defendant objected to the introduction of the deed [state grounds]; objection overruled, and defendant excepted. Also deed marked "Exhibit No. 3," dated, from to, for acres, including the premises in suit. Also deed marked "Exhibit No. 4," dated, from to, for acres, including the premises in suit. Which deeds were all admitted and read in evidence against the same objections of the defendant as above named, which were overruled, and to which he excepted.

¹ O'Neil v. Dougherty, 47 Cal 164. ² Munch v. Williamson, 24 Cal 167.

Plaintiff also offered and read in evidence desposition of, on file in this cause, as follows [insert in narrative form]. [State in like manner the evidence introduced on behalf of defendant.]

SPECIFICATION OF PARTICULARS IN WHICH THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDINGS AND DECISIONS OF THE COURT.

I. The first finding of the court is unsustained by the evidence for the reason that [show wherein].

II. That portion of the second finding reading as follows [designate the objectionable portion] is contrary to the evidence in this [show wherein].

III. That portion of the second finding reading as follows [designate other portion] is not sustained by the evidence [show wherein].

ERRORS OF LAW.

I. The court erred in denying defendant's motion for judgment on the pleadings.

II. The court erred in admitting in evidence said deed of to, dated, marked "Exhibit No. 1," there being no seal affixed thereto, and the acknowledgment thereof being defective.

III. The court erred in admitting in evidence said deed of to, dated, of the land shown to be the homestead property of and his wife, without the signature and acknowledgment of the wife.

IV. The court erred in refusing to allow defendant to prove that he actually held, possessed, and occupied the demanded premises continuously and adversely, from the day of 18..., to the day of, 18..., claiming the same in his own right, adversely to all the world, including

§ 4901. Discretion of Court.—Where there is an insufficiency of evidence to sustain the verdict, a new trial may be granted. It rests in the discretion of the court.¹ Where jury renders a verdict against the plain principles of law, as laid down by the court, and against clear and unquestioned evidence, the court will grant a new trial, notwithstanding the particular circumstances or general justice of the case.²

¹ Potter v. Carney, 8 Cal. 574; Visher v. Webster, 13 Id. 60; Lewis v. Covilland, 21 Id. 178; Oullahan v. Starbuck, Id. 413; Phelps v. Union C. M. Co., 39 Id. 467; Lorenzana v. Camarillo, 41 Id. 467; Simpson v. Pacific Mut. Life Ins. Co., 44 Id. 139; Altschul v. Doyle, 48 Id. 535; Marble v. Fay, 49 Id. 525; Doherty v. Enterprise M. Co., 50 Id. 187.

² United States v. Duval, Gilp. 356.

§ 4902. **Error in Admitting Evidence.**—From the admission of improper evidence on the trial, pertinent to any material issue, unless the same be withdrawn before the submission of the cause, injury is presumed to result to the party against whom such evidence is admitted, and he is entitled to a new trial, whether the cause be submitted to a jury for a general or special verdict, or to the court without the intervention of a jury.¹ Where improper evidence is submitted to the jury under objection, a new trial will be granted, unless it appears that such evidence could have had no influence prejudicial to the party objecting.² Injury is presumed from evidence erroneously admitted, except where it clearly appears that no injury accrued;³ or unless it satisfactorily appears that the verdict would not have been changed.⁴ And where the evidence was conflicting, the admission of any incompetent evidence which might possibly prejudice ought not to be overlooked.⁵ But where the trial is before a court or referee, a new trial will not lie where there is sufficient competent evidence to justify the judgment.⁶ Or where the evidence conflicts with the complaint.⁷ Or if there is uncontradicted evidence sufficient to warrant the verdict of the jury.⁸ Or if the objection was merely technical.⁹ And its rejection was right.¹⁰ Or no injustice was done by it.¹¹ Or if it was culminative.¹² Or where it is afterwards made competent.¹³ Or where the fact to be proved is mere surplusage, or not material to the decision of the action.¹⁴ Or was not in issue. Or where its admission has not prejudiced the case.¹⁵ Or could not have injured the defendant.¹⁶ Or does not bear upon the question decided.¹⁷ Or where the court in-

¹ Spanagel v. Dellinger, 38 Cal. 282; Rice v. Russell, 39 Id. 609; Mason v. Wolf, 40 Id. 246; Leonard v. Kingsley, 50 Id. 628.

² Innis v. Str. Senator, 1 Cal. 459; Santolun v. Moses, Id. 93; Trigg v. Conway, Hempst. 538; Walpole v. Renfroe, 16 La. Ann. 92; Consequa v. Williams, Pet. C. C. 225; Brown v. Cummings, 7 Allen, 307; see also Coglin v. Boring, 15 Cal. 213.

³ Grimes v. Fall, 15 Cal. 63; Weber v. Kingsland, 8 Bosw. 415.

⁴ Thompson v. Lothrop, 21 Pick. 340.

⁵ Whiting v. Otis, 1 Bosw. 420.

⁶ Melton v. Cobb, 21 Tex. 539; Holbrook v. Jackson, 7 Cush. 136.

⁷ Cunningham v. Kimball, 7 Mass. 65.

⁸ Zeigler v. Wells, 28 Cal. 263; Renaud v. Peck, 2 Hilt. 137; Allen v.

Blunt, 2 Woodb. & M. 121; Doane v. Baker, 6 Allen, 260; Hollinshead v. Nauman, 45 Pa. St. 140; Richardson v. Warren, 6 Allen, 552.

⁹ Allen v. Blunt, 2 Woodb. & M. 121.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Eastman v. Amoskeag Co., 44 N. H. 143.

¹⁴ Clark v. Lockwood, 21 Cal. 220; Mills v. Barney, 22 Id. 240; Allen v. Blunt, 2 Woodb. & M. 121.

¹⁵ Horford v. Wilson, 1 Taunt. 12; Cox v. Kitchin, 1 Bos. & Pul. 338; Allen v. Blunt, 2 Woodb. & M. 121.

¹⁶ Dimmick v. Milwaukee R. R. Co., 18 Wis. 471.

¹⁷ Barry v. Bennett, 7 Met. 354.

structs the jury to disregard such evidence.¹ Or where, under the decision admitting the evidence, no evidence is shown to have been given.² If the court erroneously rules that certain evidence is admissible, the opposite party is not prejudiced thereby, unless the ruling is followed by the introduction of the objectionable testimony.³ A party is not injured by a refusal to strike out exceptionable testimony, if the same party afterwards introduces the same testimony, or if counsel afterwards concedes the facts stated in such testimony.⁴ If the court erroneously allows respondent to introduce evidence upon matter not denied in the answer, but the appellant is not prejudiced thereby, a new trial will not be granted.⁵ The admission of immaterial evidence to prove a conceded point furnishes no ground for a new trial.⁶ It is no ground for a new trial that secondary evidence was admitted without a foundation for it being laid, if no objection was made to it.⁷ Or that further evidence was allowed after the testimony was closed.⁸ If the court refuse to allow an amendment to the answer, but admits evidence on the point to which the amendment referred, and it appears that the amendment is immaterial, no injury results from the refusal.⁹ Where a referee erred in receiving certain evidence, yet where such evidence, by legal necessity, can do injury, it will not authorize a new trial.¹⁰ When a witness is allowed to testify against the objection of a party to a cause, and the judge does not state the facts on which his opinion in favor of the competency of the witness depends, the parties disagreeing as to the facts, a new trial will be ordered.¹¹ Where the evidence is introduced without objection, new trial will not be granted on account of its incompetence.¹²

§ 4903. **Error in Excluding Evidence.**—When the court refuses to allow the introduction of proper evidence, and plaintiff becomes nonsuited, the judgment of nonsuit may be set aside

¹ *Union Water Co. v. Crary*, 25 Cal. 504; *Randolph v. Woodstock*, 35 Vt. 291; *Smith v. Whitman*, 6 Allen, 562; but see *Green v. Hudson River R. R. Co.*, 32 Barb. 25.

² *Randolph v. Woodstock*, 35 Vt. 291; *Fowler v. Middlesex*, 6 Allen, 92.

³ *Treat v. Reilly*, 35 Cal. 129.

⁴ *Id.*

⁵ *Wells v. McPike*, 21 Cal. 215; *Tully v. Harloe*, 35 Id. 302.

⁶ *Sibley v. Lettingwell*, 8 Allen, 584; *Rand v. Dodge*, 17 N. H. 343.

⁷ *Myer v. Avery*, 23 Ind. 510.

⁸ *Mowry v. Starbuck*, 4 Cal. 274; *Brooks v. Crosby*, 22 Id. 42; see *Howard v. Holbrook*, 9 Bosw. 237.

⁹ *Jones v. Block*, 30 Cal. 227.

¹⁰ *Forrest v. Forrest*, 6 Duer, 145; *Lowery v. Stewart*, 3 Bosw. 505; but see *Warrall v. Parmelee*, 1 N. Y. 519; *Osgood v. Manhattan Co.*, 3 Cow. 612.

¹¹ *State v. Norton*, 1 Wins. 303.

¹² *Wait v. Maxwell*, 5 Pick. 217; *Rice v. Bancroft*, 11 Id. 469; *Monson v. Palmer*, 3 Allen, 551. But see, as to the proper course where the objection arises from a defect in the pleading, *Carpentier v. Small*, 35 Cal. 346.

and a new trial granted.¹ So, also, where all evidence offered by the plaintiff is excluded, and judgment rendered for defendant.² Where a portion of plaintiff's evidence was excluded, and the court of review comes to the conclusion that if the evidence excluded had been admitted plaintiff could not have recovered, a new trial will not be granted.³ Or where the evidence was afterwards admitted.⁴ Or if it is evident that the testimony offered could have no influence upon the verdict.⁵ Or where conclusive evidence on the same point was subsequently admitted.⁶ A new trial will be ordered on the improper exclusion of a witness, although it does not appear probable that his testimony could have affected the result.⁷ But where the excluded testimony is afterwards admitted, or the point to which it is called is explained by other evidence, the error is cured.⁸ The rejection of an unimportant deposition is not of itself alone cause for a new trial.⁹

§ 4904. **Error of Law.**—It is not an error of law that the evidence is insufficient to justify a particular finding of fact; and the same is true of the verdict of a jury.¹⁰ A new trial will not be granted for an error by which the rights of the party were not prejudiced.¹¹ Nor for an error favorable to the appellant.¹² A new trial will not be granted where a demurrer to a plea was erroneously sustained when defendant could have had the full benefit of the same defense under other pleas.¹³ Nor upon refusal of a nonsuit, in cases where the deficiency was afterwards supplied.¹⁴ Nor because counsel indulged in too great latitude, arguing as to inferences to be drawn from evidence.¹⁵ If the court refuses a demand for a jury trial of issues of fact, a new trial will be granted, although the issues may have been fairly tried by the court.¹⁶ The court will never grant a new

¹ Guffey v. Moseley, 21 Tex. 408; see Robison v. Lyle, 10 Barb. 513.

² Moore v. Bates, 46 Cal. 29.

³ De Merle v. Mathers, 26 Cal. 455.

⁴ Morgan v. Reid, 7 Abb. Pr. 215; Hicks v. Whiteside, 23 Cal. 404.

⁵ Carpenter v. Norris, 20 Cal. 437; City Bank of Brooklyn v. Dearborn, 20 N. Y. 244.

⁶ Park Bank v. Tilton, 15 Abb. Pr. 384.

⁷ Brown v. Richardson, 20 N. Y. 472, 476; reversing S. C., 1 Bosw. 402; see also Buck v. Hermance, 1 Blatchf. 322.

⁸ People v. Woody, 48 Cal. 81; Byrne v. Jansen, 50 Id. 624; Branson v. Caruthers, 49 Id. 374.

⁹ Hill v. Meyers, 43 Pa. St. 170.

¹⁰ Smith v. Christian, 47 Cal. 18.

¹¹ 2 Grah. & M. on New Trial, 603; Tyler v. Green, 28 Cal. 406; Carpentier v. Gardiner, 29 Cal. 160; Mott v. Reyes, 45 Id. 379; Chipley v. Farris, Id. 527; Eckert v. Cameon, 43 Pa. St. 120; McKay v. Leonard, 17 Iowa, 469; Overland Mail etc. Co. v. Carroll, 1 West Coast Rep. 281.

¹² Wilkinson v. Parrott, 32 Cal. 102.

¹³ Powell v. Asten, 36 Ala. 140.

¹⁴ Schenectady etc. Co. v. Thatcher, 11 N. Y. 102; Colvin v. Burnet, 2 Hill, 620; Kent v. Harcourt, 33 Barb. 491.

¹⁵ United States v. Flowery, 1 Sprague, 109.

¹⁶ Treadway v. Wilder, 12 Nev. 108.

trial where the decision is right upon the whole case, although the reason stated is not the true one on which the decision should have been based.¹ Nor where plaintiff could in no event recover more than nominal damages.² Nor on account of an erroneous ruling, when it is seen that the facts can not be changed, and the facts proved are conclusive in support of the judgment.³ Nor where the court erroneously submitted a matter of law to the jury, and the verdict decided it correctly.⁴ But where a question of fact, which ought to have been submitted to the jury, was decided by the court, a new trial will be granted,⁵ unless submitted to without objection.⁶ If the court makes a ruling during the progress of a trial, the party in whose favor the ruling is is entitled to have the case decided according to the ruling, provided that if the ruling had been against him he might have been able to remove the objection made by the other party.⁷

§ 4905. **Error in Instructions.**—Where an erroneous instruction has been given, which may have influenced the verdict, a new trial will be granted;⁸ for example, instruction on matter of fact.⁹ But where no other conclusion than that directed by the court could be arrived at from the evidence, it is error without prejudice, and therefore not ground for reversal.¹⁰ Or where the judge refused instructions on a matter of law.¹¹ But where incorrect instructions are given in favor of defendant, he can not complain of the error.¹² Or an error which does not militate against appellant,¹³ or injure him.¹⁴ Or a mere want of perspicuity in framing the instruction.¹⁵ A new trial will not be granted on the ground of erroneous instructions as to measure of damages, if it appear by bill of exceptions that the damages assessed were not too great.¹⁶ Or where, notwithstanding such

¹ *Munroe v. Potter*, 22 How. Pr. 49; see also *Kidd v. Teeple*, 22 Cal. 255.

² *Hopkins v. Grinnell*, 28 Barb. 533; *McConihe v. N. Y. & E. R. R. Co.*, 20 N. Y. 495.

³ *Brown v. Bowen*, 30 N. Y. 519.

⁴ *Stokes v. Arey*, 8 Jones L. 66.

⁵ *San Francisco v. Clark*, 1 Cal. 386.

⁶ *Clark v. Mayor of New York*, 24 How. Pr. 333.

⁷ *Carpentier v. Small*, 35 Cal. 346.

⁸ *Slaughter v. Fowler*, 44 Cal. 195; *Younge v. Pacific Mail S. S. Co.*, 1 Id. 353; *Miller v. Stewart*, 24 Id. 502; *Gale v. Wells*, 12 Barb. 85; *Hunter v. Ousterhoudt*, 11 Id. 33; *Scott v. Lunt*, 7 Pet. 596; *Rochell v. Phillips*,

Hempst. 22; *United States v. Beatty*, Id. 487.

⁹ *Pico v. Stevens*, 18 Cal. 376.

¹⁰ Id.

¹¹ *Emerson v. Hogg*, 2 Blatchf. 1.

¹² *Gaven v. Dopman*, 5 Cal. 342; *Wilkinson v. Parrott*, 32 Id. 102.

¹³ *People v. Moore*, 8 Cal. 94.

¹⁴ *Thompkins v. Mahoney*, 32 Cal. 231; *Fagan v. Williamson*, 8 Jones L. 433; *Hook v. Craghead*, 35 Mo. 380; *Winans v. Sierra Lumber Co.*, 4 West Coast Rep. 277; *Bassett v. Inman*, 2 Id. 534.

¹⁵ *People v. Moore*, 8 Cal. 94; *McKinney v. Smith*, 21 Id. 374; *Hooksett v. Amoskeag etc. Co.*, 44 N. H. 105.

¹⁶ *Couillard v. Duncan*, 6 Allen, 440.

instruction, the jury came to the proper understanding, and rendered a correct verdict.¹ When a single statement in a judge's charge contains two propositions, one of which is erroneous, court will order a new trial if it appear the jury was misled thereby.² The whole charge to the jury should be taken together, and if the case appears to have been fairly presented to the jury the verdict will not be disturbed.³ Where several defenses are pleaded, either of which is good in law, and the court errs in its instructions as to one of the defenses, unless it appear that the verdict was rendered on a defense in relation to which no error was committed, a new trial will be granted.⁴ So where the verdict involves more than one issue, if the charge is erroneous as to either issue.⁵ Or if there is some evidence, although it may have been slight, upon which the instructions were based.⁶ Wherever the court, on a supposed state of facts, instructs the jury if they so find the facts to render a verdict for the plaintiff, when the instruction should have been to find in that event a verdict for the defendant, the remedy, if no exception is taken, is to move on a case for a new trial.⁷ If a party desires to call the attention of the judge to the fact that he was mistaken as to certain evidence having been given as stated in the charge, he should do so directly and in a way to inform the judge thereof, and request him to admonish the jury that in fact no such evidence had been given, and if the judge from misapprehension refuse to correct the error, the party prejudiced thereby would be entitled to relief on his motion for a new trial on a case.⁸ If a fact is improperly found, the proper remedy is a new trial.⁹ Though the instruction given at the request of a party was inaccurate, yet if it was not excepted to, and the jury did not find in conformity to it, a new trial should not be granted.¹⁰ Where an erroneous instruction is given to the jury the judgment will be reversed unless it appear that appellant was not prejudiced thereby.¹¹ The judge has a right to aid

¹ *Haskell v. McHenry*, 4 Cal. 411; *Pratte v. Judge Court Comm. Pleas*, 12 Mo. 194; *Marcy v. Shults*, 29 N. Y. 346.

² *Green v. Hudson Riv. R. R. Co.*, 32 Barb. 25; *Downing v. Bartels*, 2 West Coast Rep. 506.

³ *Carrington v. Pacific M. S. S. Co.*, 1 Cal. 475; *Dwinelle v. Henriquez*, 1 Id. 387; *Brooks v. Crosby*, 22 Id. 42; *People v. Cleveland*, 49 Id. 578; *People v. Dennis*, 39 Id. 625; *Burton v. Merrick*, 21 Ark. 357; *People v. Biggins*, 2 West Coast Rep. 887; *People v.*

Turcott, Id. 490; *People v. McDowell*, 1 Id. 478.

⁴ *Wiseman v. McNulty*, 25 Cal. 234.

⁵ *Whitacre v. Culver*, 8 Minn. 133.

⁶ *Perlberg v. Gorham*, 10 Cal. 120.

⁷ *Brush v. Kohn*, 9 Bosw. 589.

⁸ *Varnam v. Taylor*, 10 Bosw. 148.

⁹ *North Am. Oil Co. v. Forsyth*, 48 Pa. St. 291.

¹⁰ See *Rogers v. Murray*, 3 Bosw. 357.

¹¹ *Richardson v. McNulty*, 24 Cal. 339.

the jury by an expression of his opinion upon the effect of the evidence, but not so as to mislead or control their deliberations; that which a jury have a right to decide ought to be so submitted as to leave them free to decide it either way.¹

§ 4906. **Error as to One Affects All.**—If an order or decision of the court, made on the motion or at the request of one of several defendants, be erroneous, the responsibility will attach alike to all the defendants, unless it appears that the order or decision was clearly restricted, or would necessarily have an application only to particular defendants or their interests.²

§ 4907. **Error in Findings.**—Where certain findings are unsupported by any evidence, such findings should be set aside, and a new trial granted.³ If on the trial the court finds from the evidence all the facts necessary to entitle the plaintiff to recover, and upon re-examination, on motion for a new trial, finds that a fact essential to plaintiff's recovery is not proved, a new trial should be granted.⁴ If a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the finding of the fact in relation to it by the court.⁵ If the findings follow the issues, and a demurrer would not be sustained to the complaint, judgment will not be arrested on the findings.⁶ Nor for inaccuracy in the language of a finding sufficiently distinct as to a material question involved.⁷

§ 4908. **Exceptions must be Taken at the Trial.**—Exceptions must be taken to the ruling of the court.⁸ Where a party wishes to put on record, for purposes of review, the decision of the court on a matter of fact, the only mode is to request that written findings be filed, and on failure or refusal to do so, to except for want of findings. A decision by the court on a matter of fact can not be established by affidavit on motion for new trial.⁹ If an objection is taken to evidence by counsel, and the objection is overruled by the court, and no exception is taken to the ruling, the presumption is that the counsel acqui-

¹ Mohney v. Evans, 51 Pa. St. 80; see Battersby v. Abbott, 9 Cal. 565; and Aylwin v. Ulmer, 12 Mass. 22.

² Judson v. Malloy, 40 Cal. 307.

³ Smith v. Athern, 34 Cal. 506.

⁴ Hawkins v. Reichert, 28 Cal. 534.

⁵ McComb v. Reed, 28 Cal. 281; Smith v. Owens, 21 Id. 11.

⁶ Millard v. Hathaway, 27 Cal. 119.

⁷ McKinney v. Smith, 21 Cal. 374.

⁸ McCloud v. O'Neill, 16 Cal. 392; Russell v. Union Ins. Co., 1 Wash. C. C. 440; Farmers' Loan and Trust Co. of N. Y. v. McKinney, 6 McLean, 1; see *ante*, "Exceptions;" Leahy v. S. P. R. R. Co., 2 West Coast Rep. 693; Territory v. Young, 4 Id. 468; Cook v. Territory, Id. 430.

⁹ Sanchez v. McMahon, 35 Cal. 218.

esced in the ruling.¹ If incompetent testimony is admitted without objection, the court will treat the testimony as competent on motion for nonsuit, and on motion for new trial.² The nature of the objections to the admission of evidence must be shown.³

§ 4909. **Excessive Damages.**—Courts will grant a new trial where the damages are unjustifiable or grossly inconsistent with the facts of the case.⁴ The mere fact that damages are excessive is not a ground for new trial; they must appear to have been given under the influence of passion or prejudice.⁵ But where the verdict is for a sum greatly disproportionate to the injury, that is of itself evidence that it was rendered under the influence of passion or prejudice.⁶ In case the verdict exceeds the damages claimed in the complaint, a new trial will be granted.⁷ But a new trial will not be granted where the verdict exceeds the amount of damages laid in the writ, but not the amount laid in the declaration.⁸ But the excess may be remitted and the judgment stand.⁹ So, also, in other cases of excessive damages.¹⁰ This, however, is in the discretion of the court.¹¹ But although there are cases in which the courts have reduced the verdict where the damages were excessive, it would seem to be doubtful practice in actions for personal injuries.¹² The offer to remit comes too late after new trial granted.¹³ In actions for personal torts, the law fixes no precise rule of damages, but leaves their assessment to the unbiased judgment of the jury; and the verdict will not be disturbed on the ground

¹ *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 404.

² *Janson v. Brooks*, 29 Cal. 214.

³ *Cox v. Jackson*, 6 Allen, 108.

⁴ *McDaniel v. Baca*, 2 Cal. 326; *Potter v. Seale*, 5 Id. 410; see also *Pleasants v. N. B. & M. R. R. Co.*, 34 Id. 586; *Gleason v. Bremen*, 50 Me. 222; *Scherpf v. Szadeczky*, 1 Abb. Pr. 366; *Blum v. Higgins*, 3 Id. 104; *Fry v. Bennett*, 9 Id. 45; *Knight v. Wilcox*, 18 Barb. 212; *Clapp v. Hudson River R. R. Co.*, 16 Id. 461; *Hamilton v. Third Av. R. R. Co.*, 48 How. Pr. 50; *Duffy v. Chicago etc. Railway Co.*, 34 Wis. 188; *Patten v. Chicago etc. R. R. Co.*, 36 Id. 413.

⁵ *M. K. & T. R. R. Co. v. Weaver*, 16 Kan. 456; Cal. Code C. P., sec. 657, subd. 5.

⁶ *Kinsey v. Wallace*, 36 Cal. 481; *McCarty v. Fremont*, 23 Id. 197.

⁷ *Palmer v. Reynolds*, 3 Cal. 396; *McIntire v. Clark*, 7 Wend. 330; see

also *Dox v. Dey*, 3 Id. 356; *Corning v. Corning*, 6 N. Y. 97; *Decker v. Parsons*, 11 Hun, 295; *Manson v. Robinson*, 37 Wis. 339; *contra*: *Webb v. Thompson*, 23 Ind. 428.

⁸ *Roderick v. R. R. Co.*, 7 W. Va. 54.

⁹ *Pierce v. Payne*, 14 Cal. 420; *Manson v. Robinson*, 37 Wis. 339.

¹⁰ *McLaughlin v. Wash. County Mut. Ins. Co.*, 23 Wend. 525; *Jansen v. Ball*, 6 Cow. 628; *Diblin v. Murphy*, 3 Sandf. 19; *Clapp v. Hudson River R. R. Co.*, 19 Barb. 461; *Murray v. Same*, 47 Id. 196; *Collins v. Albany & S. R. R. Co.*, 12 Id. 492; *Devore v. McDermitt*, 47 Ind. 234; *Scott v. Lilienthal*, 9 Bosw. 224.

¹¹ *Clark v. Huber*, 20 Cal. 198.

¹² *Gale v. N. Y. Cent. & H. R. R. Co.*, 53 How. Pr. 385; but see *Johnson v. Root*, 2 Fish. Pat. Cas. 291.

¹³ *Hill v. Newman*, 47 Ind. 187.

of excessive damages unless the amount is so disproportionate to the injury as to justify the conclusion that the verdict is not the result of the cool, dispassionate consideration of the jury.¹

§ 4910. **Exemplary or Punitive Damages.**—Where punitive damages are allowable, they should bear proportion to the actual damage; and if they fail to do so, whether too small or too great, the court should award a new trial.² If the court instruct the jury that they “can not find vindictive damages,” and the jury, notwithstanding the instruction, do find such damages, that in itself is not sufficient ground for a new trial, if the verdict be not excessive.³

§ 4911. **Erroneous Rule in Assessing Damages.**—Where the jury adopt a rule of compensation, not justified by the evidence and at variance with the instructions of the court, a new trial should be granted.⁴ In a case of infringement of patent, if the court instruct the jury that if their verdict be for plaintiff it must be for nominal damages only, and they return a verdict for five hundred dollars, it was held that while errors of this description may sometimes be obviated by allowing the prevailing party to remit the excess when the court is satisfied that the error arose from oversight or inadvertence, yet when the finding is not only contrary to the evidence but in direct contravention of the charge of the court, the verdict will be set aside and a new trial granted.⁵

§ 4912. **Facts must be Shown.**—The facts should be stated, from which the court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim.⁶ If the statement shows that too high a rate of interest was allowed by the jury upon an account sued on, for a part of the time, a new trial will be granted unconditionally unless it appears that plaintiff had not kept his account for the residue of the time upon the erroneous basis of interest, and he will consent to remit the excess.⁷ Circum-

¹ Aldrich v. Palmer, 24 Cal. 513; Wheaton v. N. B. & M. R. R. Co., 36 Id. 591; Myers v. San Francisco, 42 Id. 215; Russell v. Dennison, 45 Id. 337; Coleman v. Southwick, 9 Johns. 45; Southwick v. Stevens, 10 Id. 443; McConnell v. Hampton, 12 Id. 234; Sargent v. ———, 5 Cow. 106; Moody v. Baker, Id. 351; Travis v. Barger, 24 Barb. 614; Parker v. Lewis, Hempst. 72; Palmer v. Fiske, 2 Curt. C. C. 14; Swan v. Bowie, 2 Cranch C. C. 221; St. Paul v. Kuby,

8 Minn. 154; Miss. Cent. R. R. Co. v. Caruth, 51 Miss. 77; C. & A. R. Co. v. Wilson, 63 Ill. 167.

² Mobile etc. R. R. Co. v. Ashcraft, 48 Ala. 15.

³ Dye v. Denham, 54 Ga. 224; but see Wilson v. Fitch, 41 Cal. 363.

⁴ Karr v. Parks, 44 Cal. 50.

⁵ Johnson v. Root, 2 Fish. Pat. Cas. 291; see Whitney v. Emmett, Baldw. 325.

⁶ Patterson v. Ely, 19 Cal. 28.

⁷ Clark v. Gridley, 35 Cal. 398.

stances must show that the jury have made some mistake in the rules of law applicable, or in their mode of computation, or that they have been actuated by passion or prejudice, or some improper feeling.¹

§ 4913. **Inadequate Damages.**—A new trial will be granted for inadequacy of damages as well as for excessive damages,² especially where the amount shows a compromise.³

§ 4914. **Insufficient Grounds.**—It is no ground for a new trial of the issues of fact that the judgment is broader than the facts alleged and found would justify. Such an error does not affect the findings where it occurred in entering the judgment subsequent to the findings.⁴ The court will not grant a new trial on the ground of excessive damages when the verdict was in accordance with the direction of the court;⁵ or where the defendant leaves the matter to general inference;⁶ or where the claim for damages rests entirely on the uncontroverted allegations of the complaint, judgment will not be disturbed;⁷ or where defendants admit that the amount claimed is correct;⁸ or that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the *ad damnum* in the declaration, were not sufficient for a new trial.⁹

§ 4915. **Libel and Slander.**—It is only in rare cases, and where the damages are obviously and grossly excessive, that a new trial will be granted in a case of libel or slander.¹⁰ But in action for libel, if there is no proof of malice, and the publication is made in the usual course of defendant's business as public journalist in the full belief of the truth of the article after careful inquiry from an apparently reliable source, the jury should not award punitive damages; and to do so would be a ground for new trial.¹¹

§ 4916. **Legal Effect of Evidence.**—But where the jury acted under a mistaken impression as to the legal effect of evi-

¹ Aldrich v. Palmer, 24 Cal. 513; Boyce v. California Stage Co., 25 Id. 460.

² Hall v. Bark Emily Banning, 33 Cal. 522; Mariani v. Dougherty, 46 Id. 26; McDonald v. Walter, 40 N. Y. 551; Richards v. Sandford, 2 E. D. Smith, 349; Robbins v. Hudson River R. R. Co., 7 Bosw. 1; see Moore v. Wood, 19 How. Pr. 405; Taylor v. Howser, 12 Bush, 465.

³ Falvey v. Stanford, L. R., 10 Q. B., 54.

⁴ Shepard v. McNeil, 38 Cal. 72.

⁵ Stimpson v. The Railroads, 1 Wall. jun. C. C. 164.

⁶ Stephens v. Felt, 2 Blatchf. 37.

⁷ Patterson v. Ely, 19 Cal. 28.

⁸ Rowe v. Smith, 10 Bosw. 268.

⁹ Huff v. Hutchinson, 14 How. U. S. 586.

¹⁰ Root v. King, 7 Cow. 613; Tiltonson v. Cheetham, 2 Johns. 63; Cook v. Hill, 3 Sandf. 341; Ostrom v. Calkins, 5 Wend. 263; Kyckman v. Parkins, 9 Id. 470.

¹¹ Wilson v. Fitch, 41 Cal. 363; see also Potter v. Thompson, 22 Barb. 87.

dence, or in a total disregard of it, a new trial will be granted.¹ A new trial will not be granted on the affidavits of jurors that the jury misapprehended the testimony, where no reasonable ground for such misapprehension appears.²

§ 4917. **New Trial will be Granted.**—Where an attorney appears and conducts the defense, the remedy of defendant is by motion for a new trial; but where such attorney appears without authority and by mistake, the remedy may be by motion for relief from the judgment.³ Where judgment is founded in part upon a betting contract, a new trial will be granted;⁴ or where the referee decided against the weight of evidence, and erred in the application of the rules of law,⁵ or the evidence is overwhelmingly against the finding.⁶ It is error when a particular fact in a cause is found by a jury to enter judgment for the party against whom it was found, on the ground that the evidence was insufficient to establish it. The proper remedy is a new trial.⁷ Where the finding is opposed to the evidence, a new trial will be granted;⁸ but it must be palpably so,⁹ or not sustained by the evidence;¹⁰ or where the evidence has failed to support several material allegations of the complaint;¹¹ or where the findings are not warranted by the evidence.¹² This rule applies to law and equity cases alike,¹³ and to findings by referees.¹⁴ But the evidence must be such that if questions had been submitted to a jury, the court would set aside the verdict as contrary to evidence,¹⁵ where the verdict is obtained on improper or incompetent evidence; but it must be objected to at the time to constitute it a ground for new trial;¹⁶ or where there is no evidence upon a point essential to sustain

¹ *Minturn v. Burr*, 20 Cal. 48; *Todd v. Boone Co.*, 8 Mo. 431; *Fulkerson v. Bollinger*, 9 Id. 228; *Wilkinson v. Greeley*, 1 Curt. C. C. 63; *Moran v. Bogert*, 16 Abb. Pr., N. S., 303.

² *Jack v. Naber*, 15 Iowa, 450; *Moffit v. Rogers*, Id. 453.

³ Cal. Code C. P., sec. 473; *McKinley v. Tuttle*, 34 Cal. 235.

⁴ *Sisk v. Evans*, 8 Mo. 52.

⁵ *Brown v. Penfield*, 24 How. Pr. 64.

⁶ *Carpentier v. Gardiner*, 29 Cal. 164; *Branson v. Caruthers*, 49 Id. 375; see also *Walsh v. Hill*, 41 Id. 571; *Guerrero v. Ballerino*, 48 Id. 118.

⁷ *North American Oil Co. v. Forsyth*, 48 Pa. St. 201.

⁸ *Frauklin v. Dorland*, 28 Cal. 175; *Lyle v. Rollins*, 25 Id. 457; *Slocum v. Lurty*, *Hempst.* 431; *Zantzinger v.*

Weightman, 2 Cranch C. C. 478; *Wilson v. Janes*, 3 Blatchf. 227.

⁹ *Hunt v. Hunt*, 3 B. Mon. 575.

¹⁰ *Cox v. Hamilton*, 21 Tex. 777.

¹¹ *Watkins v. Rogers*, 21 Ark. 298.

¹² *Bolton v. Stewart*, 29 Cal. 615; see also *Appeal of Piper*, 32 Cal. 530; affirmed in *Appeal of Brooks*, Id. 559.

¹³ *Doe v. Vallejo*, 29 Cal. 386.

¹⁴ *Brady v. Brown*, 20 Cal. 520; *Cappe v. Brizzolara*, 19 Id. 607; *Brown v. Penfield*, 24 How. Pr. 64.

¹⁵ *Moore v. Murdock*, 26 Cal. 524.

¹⁶ *McCloud v. O'Neill*, 16 Cal. 392; *Hahn v. Van Doren*, 1 E. D. Smith, 411; *Anderson v. Busteed*, 5 Duer, 485; *Travis v. Barger*, 24 Barb. 614; *Weeks v. Lowerre*, 8 Id. 530; *Clark v. Crandall*, 3 Barb. 612; *Vallance v. King*, Id. 548.

the verdict;¹ or an essential finding of the court.² A verdict for a tenant claiming title by twenty years' possession can not be sustained without evidence that his possession was adverse to the title of the true owner.³ So, also, where a verdict is void for repugnancy or uncertainty;⁴ or where complaint claims on two distinct grounds, and some of the jury might have decided on one and some on the other;⁵ or where several counts are abandoned, and the verdict is rendered upon two counts which do not lay a foundation for the damages found by the jury;⁶ or if one of the counts is defective, or an error has been committed as to one of them.⁷

§ 4918. **Statement must Contain.**—Specifications in a statement of "particulars in which the court erred" can not be considered as specifications in which the evidence is insufficient.⁸ Errors in law must be specified in the statement in case they are relied upon, or it is error to grant a new trial on that ground.⁹ Where a statement on motion for a new trial fails to specify wherein the evidence is insufficient to justify the decision, such insufficiency, as a ground of the motion, will be disregarded.¹⁰ It must specify the particulars in which the evidence is alleged to be insufficient.¹¹ And if the objection to the verdict is that it is against the weight of evidence, must set forth all the testimony.¹² But the presumption is that the statement contains all the evidence relating to the point specified, although the record does not affirmatively show that such is the case.¹³ Where the statement on motion for a new trial did not contain that part of the evidence upon the sufficiency of which the truth of implied findings of fact depended, but showed merely that the moving party at the trial "introduced evidence tending to prove" a state of facts adverse to those thus impliedly found,

¹ Cummins v. Scott, 20 Cal. 83; Jackson v. Sacramento R. R. Co., 23 Cal. 268; Doll v. Anderson, 27 Id. 250; White v. Claves, 32 Ill. 325; Rathbone v. Stanton, 6 Barb. 141; Bailey v. Ellis, 21 Ark. 488; Backus v. Clark, 1 Kan. 303; Wright v. Orient Ins. Co., 6 Bosw. 269; compare Kinsman v. N. Y. Mut. Ins. Co., 5 Id. 460.

² Smith v. Athearn, 34 Cal. 506; Himmelmann v. Spanagel, 39 Id. 389; Moss v. Atkinson, 44 Id. 16.

³ Eaton v. Jacobs, 49 Me. 559.

⁴ Stearns v. Barrett, 1 Mason, 153; and see Thompson v. Carberry, 2 Cranch C. C. 30.

⁵ Biggs v. Barry, 2 Curt. C. C. 259

⁶ Jones v. Vanzandt, 2 McLean, 611.

⁷ Wilson v. Tatum, 8 Jones L. 300; Middlesex Canal v. McGregore, 3 Mass. 124; see also United States v. Smith, 3 Blatchf. 225.

⁸ Smith v. Christian, 47 Cal. 18.

⁹ McWilliams v. Herschman, 5 Nev. 263.

¹⁰ Sanchez v. McMahon, 35 Cal. 218; Pralus v. Pacific G. & S. Min. Co., 35 Cal. 30.

¹¹ Love v. Sierra Nevada Lake Water and Min. Co., 32 Cal. 639; Elder v. Shaw, 12 Nev. 78.

¹² Libby v. Dalton, 9 Nev. 23; Dawley v. Hovious, 23 Cal. 103.

¹³ Hidden v. Jordan, 28 Cal. 301; Clark v. Gridley, 35 Id. 403.

and the express findings were clearly sustained by the evidence set out in the statement, it was held that the statement was insufficient to show the moving party entitled to a new trial, because it did not appear that said evidence which "tended to prove" amounted in fact to proof of said state of facts.¹ If the moving party, on motion for new trial, intends to rely on the point that a finding of fact is contrary to the evidence, he should specify in his statement wherein such finding is not justified by the evidence. It is not sufficient for him to state generally that the evidence is insufficient to justify the findings.²

§ 4919. **Verdict against Law.**—A verdict against the instructions of the court should be set aside.³ A jury is bound to take the law from the court, and can not disregard an instruction upon that subject, however erroneous it may be.⁴ A verdict of a jury in disobedience to the instructions of the court upon a point of law is a verdict against law, and for that reason should be set aside without further consideration.⁵ An averment that the verdict is against law is not sustained by showing that it is unsupported by the evidence.⁶

§ 4920. **Weight of Evidence.**—In some extraordinary cases where the verdict of a jury is clearly against the weight of evidence, a new trial will be awarded;⁷ but the supreme court will not interfere with a verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases.⁸ To justify the court in setting aside the verdict as against the weight of evidence, the court should be brought to the irresistible conclusion that the verdict was not the free, sound, and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result.⁹ Where the

¹ Morrill v. Chapman, 35 Cal. 85.

² Beans v. Emanuelli, 36 Cal. 117.

³ Farley v. Budd, 14 Iowa, 289.

⁴ Sweetman v. Prince, 62 Barb. 256; Clark v. Richards, 3 E. D. Smith, 89.

⁵ Emerson v. Santa Clara Co., 40 Cal. 543.

⁶ Brumagim v. Bradshaw, 39 Cal. 35.

⁷ Bagley v. Eaton, 8 Cal. 159; Hill v. Smith, 32 Id. 165; Hart v. Leavenworth, 11 Mo. 629; Dolsen v. Arnold, 10 How. Pr. 528; Heritage v. Hall, 33 Barb. 347; Smith v. Tiffany, 36 Id. 23; Coddington v. Carnley, 2 Hilt. 528; State v. Elliott, 15 Iowa, 72; Edmiston v. Garrison, 18 Wis. 504; Gaines v. Forchheimer, 9 Fla. 265; Slocum v. Lurty, Hempst. 431; Zant-

zinger v. Weightman, 2 Cranch C. C. 478; Wilson v. Janes, 3 Blatchf. 227.

⁸ See Treat v. Reilly, 35 Cal. 120; Kimball v. Gearhart, 12 Id. 27; White v. Lezynsky, 14 Id. 167; Bensley v. Atwill, 12 Id. 240; Ritter v. Stock, Id. 402; McGarrity v. Byington, Id. 432; Visser v. Webster, 13 Id. 60; Adams v. Pugh, 7 Id. 150; Ritchie v. Bradshaw, 5 Id. 228; Knowles v. Joost, 13 Id. 620; Lewis v. Covillaud, 21 Id. 178; Oullahan v. Starbuck, Id. 413; Tebbe v. Weatherwax, 23 Id. 58; Preston v. Keys, Id. 193; Ellis v. Jeans, 26 Id. 275; Wilcoxson v. Burton, 27 Id. 232; Wilkinson v. Parrott, 32 Id. 102; Newell v. Rusk, 23 Ind. 210; Ratton v. Patton, 5 J. J. Marsh. 389; United States v. Duval, Gilp. 356.

⁹ McKay v. Thorington, 15 Iowa, 25.

court before which the case is tried is not satisfied with the verdict, and is convinced that it is clearly against the weight of evidence, it should grant a new trial, although there may be some conflict in the testimony.¹ And where there is a conflict and the trial court grants a new trial, it will be presumed on appeal that the court below was of opinion that the evidence preponderated against the verdict,² even though the judge who granted the new trial is different from the one who tried the case and did not hear the testimony.³ If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on appeal, for insufficiency of evidence to sustain the verdict.⁴ But where there was evidence on both sides, it must clearly appear that the verdict was given by mistake or willful abuse of power;⁵ but it should not go beyond that point to interfere with decision of fact fairly deducible from conflicting testimony.⁶ In such case the verdict of a jury is decisive;⁷ as in questions of fraud;⁸ questions of title to chattels;⁹ or the genuineness of a signature;¹⁰ or a question turning on the credibility of a witness.¹¹

§ 4921. Notice of Settlement of Statement.

Form No. 1155.

[TITLE.]

A. B., esq., attorney for plaintiff, John Doe:

Please take notice that the defendant's statement to be used on his motion for a new trial herein will be settled by the judge

¹ Dickey v. Davis, 39 Cal. 565; People v. Baker, Id. 686; Hawkins v. Abbott, 40 Id. 641; Phillpotts v. Blasdel, 8 Nev. 61.

² Mason v. Austin, 46 Cal. 387; Sherman v. Mitchell, Id. 576; Treadway v. Wilder, 9 Nev. 67; Magaroli v. Mulligan, 11 Id. 96; People v. Burt, 2 West Coast Rep. 721; Davis v. U. S. R. R. Co., Id. 453; Johnson v. Hancock, 4 Id. 418; Herzog v. Julien, 3 Id. 525; Nelson v. Floyd, Id. 144.

³ Macy v. Davila, 48 Cal. 647; Altschul v. Doyle, Id. 535; Rice v. Cunningham, 29 Id. 492.

⁴ Kile v. Tubbs, 32 Cal. 333; Rice v. Cunningham, 29 Id. 492.

⁵ Carr v. Gale, 3 Woodb. & M. 38; Fearing v. De Wolf, Id. 185; Aiken v. Bemis, Id. 348; Whetmore v. Murdock, Id. 380; Davison v. Sealskins, 2 Paine, 324; Stanley v. Whipple, 2 McLean, 35; to nearly the same effect: Blanchard's Gun Stock Turning Factory v. Jacobs, 2 Blatchf. 69; Baker

v. The Potomac, 18 How. Pr. 185; Shaw v. Collier, Id. 238; Walker v. Smith,⁶ 1 Wash. C. C. 202; People v. Forsythe, 2 West Coast Rep. 288; Winans v. Sierra Lumber Co., 4 Id. 277; Harrington v. Chambers, 1 Id. 63; Salisbury v. Brown, 3 Id. 618; Jack v. Saunders, Id. 480; Reynolds v. Scott, Id. 291.

⁶ Mathews v. Poultney, 33 Barb. 127; Smith v. Tiffany, 36 Id. 23.

⁷ Conklin v. Thompson, 29 Barb. 218; Best v. Starks, 24 How. Pr. 58; Sheldon v. Hudson River R. R. Co., 29 Barb. 226; Williams v. Vanderbilt, Id. 491.

⁸ 1 Gra. & Wat. on New Trial, 353; Comfort v. Thompson, 10 Johns. 101; Jarvis v. Hatheway, 3 Id. 180; People v. Townsend, 37 Barb. 520.

⁹ Gardner v. Ryerson, 19 How. Pr. 108.

¹⁰ Wright v. Carillo, 22 Cal. 595.

¹¹ United States v. Five Cases of Cloth, 2 N. Y. Leg. Obs. 84.

of this court on the day of, 18..., at o'clock, at his chambers, in the city hall in the city of, in the county of

§ 4922. **Amendments, how Made.**—If the proposed statement be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto, and serve the same or a copy thereof upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and presented to the judge who heard or tried the cause, for settlement, or to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall within ten days thereafter be presented by the moving party to the judge upon five days' notice to the adverse party, or deliver to the clerk of the court for the judge, and settled as bills of exceptions. If the action was tried by a referee, the statement shall be settled as are bills of exceptions. If no amendments are served within time, or if served, are allowed, the statement and amendment, if any, may be presented for settlement without notice to the adverse party.¹

§ 4923. **Amendments after Settlement.**—An amendment after settlement, adding no facts or exceptions, and not affecting the merits, and in furtherance of justice, is in the discretion of the court, and may be allowed.² Courts should be liberal in allowing amendments of this kind.³ But otherwise a court should not entertain a motion to amend after it has been filed and served on the opposite party.⁴ Nor, unless good reason be shown, receive an affidavit made after time has elapsed.⁵ A statement agreed to should not be amended, unless under a very clear showing of mistake or fraud.⁶

§ 4924. **Certificate.**—When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.⁷ Under the former practice act, the certificate of the attorneys for the respective parties that the statement had been agreed upon and was correct was also a mode of authentication.⁸ And it has been held under the present California code of civil procedure that the certificate of the judge or referee may be waived by stipulation, and if so waived on the hearing of the motion, it

¹ Cal. Code C. P., sec. 659, subd. 3. See *ante*, "Exceptions."

² Valentine v. Stewart, 15 Cal. 387; affirmed in Loucks v. Edmondson, 18 Id. 203.

³ Caldwell v. Greely, 5 Nev. 263.

⁴ Levy v. Getleson, 27 Cal. 685.

⁵ Howe v. Briggs, 17 Cal. 385.

⁶ Hutchinson v. Bours, 13 Cal. 52.

⁷ Cal. Code C. P., sec. 659, subd. 3.

⁸ See Godchaux v. Mulford, 26 Cal. 316.

can not be raised on appeal.¹ A certificate can not be added, nor additions made thereto after appeal taken.²

§ 4925. **Effect of Notice.**—If the notice of the time and place of the settlement of a statement is given to appellant, and he does not attend, he can not afterwards complain of the statement as settled.³

§ 4926. **Exclusion of Useless Matter.**—It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to the redundant or useless matter, or to any inaccurate statement.⁴ If the motion is heard upon the minutes of the court, and a statement be subsequently prepared for appeal, such statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.⁵ The proper place to object to the insertion of immaterial matter is on the settlement of the statement.⁶

§ 4927. **Engrossment of Statement.**—The proper practice is to engross the statement as settled, and so much of the deeds and other documentary evidence as is directed to be inserted, with the authentication of the judge indorsed on the engrossed statement.⁷ Where the refusal of the court to admit certain documentary evidence is relied upon as error, the record should contain either a copy of such documentary evidence or a settled abstract of its contents.⁸ The engrossed statement must contain all that the parties rely on, set out in full as they wish it to be considered by the court.⁹ Neither the notice of motion for new trial nor affidavits in support of it have properly any place in a statement on motion for a new trial.¹⁰

§ 4928. **Statement, how Authenticated.**—A statement not authenticated by certificate of the parties or the judge will not be regarded.¹¹ A statement signed by the judge, and ap-

¹ *Sarver v. Garcia*, 49 Cal. 218. See, as to the effect of a recital in the order of the court, *Millard v. Hathaway*, 27 Id. 139. In *Vilhac v. Biven*, 28 Id. 413, it was held that a statement without any certificate of its correctness could not be considered on appeal. See *post*, note "Statement, how authenticated."

² *Caples v. C. P. R. Co.*, 6 Nev. 265; *Lamburth v. Dalton*, 9 Id. 64. As to presumptions in favor of judge's certificates, see *Overman S. Mining Co. v. American M. Co.*, 7 Id. 312.

³ *Vilhac v. Biven*, 28 Cal. 409.

⁴ California Code of Civil Procedure, sec. 659, subd. 3.

⁵ Id., sec. 661.

⁶ *Kimball v. Semple*, 31 Cal. 657.

⁷ *Kimball v. Semple*, 31 Cal. 657; *Marlow v. Marsh*, 9 Id. 259.

⁸ *Doyle v. Franklin*, 48 Cal. 537.

⁹ *Bush v. Taylor*, 45 Cal. 112.

¹⁰ *Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 416.

¹¹ *Vilhac v. Biven*, 28 Cal. 409; *Cosgrove v. Johnson*, 30 Id. 509.

pearing from the minutes of the court to have been used on the hearing of the motion, is sufficiently authenticated.¹ Agreeing to submit a motion, without the statement having been settled or authenticated, does not waive objection to want of authentication.² A refusal to strike out a proposed amendment is not an authentication and settlement of a statement;³ nor is an indorsement by the judge at the bottom of the settlement that the amendments were allowed.⁴ Where the record shows simply a statement signed by the judge, without any certificate preceding as to the correctness of the statement, it is insufficient.⁵ Unless a statement be agreed to by counsel or settled by the judge, it has not sufficient authentication to constitute any portion of the record.⁶ Where a statement is not authenticated in the mode prescribed by statute, it is a good ground for denying a new trial.⁷

§ 4929. **Settlement, when Made.**—Such statement should be settled by the judge and certified by him before the motion is decided,⁸ unless the motion be made upon the minutes of the court.⁹ But it need not be shown affirmatively that the settlement was upon proper notice, or in the presence of both parties.¹⁰

§ 4930. **Motion—Hearing.**—Under the code system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or in a certain sense a collateral proceeding, a proceeding not in the direct line of the judgment, for the judgment may be at once entered and even executed, while the motion for new trial ends in an order reviewable on an independent appeal.¹¹ The motion for a new trial must be made promptly, but especially if based upon the ground of surprise.¹² The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court; and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party.¹³ If a motion for a new

¹ Kidd v. Laird, 15 Cal. 161.

² Cosgrove v. Johnson, 30 Cal. 509.

³ Id.

⁴ Baldwin v. Ferre, 23 Cal. 461.

⁵ McCartney v. Fitz Henry, 16 Cal. 184.

⁶ Doyle v. Seawall, 12 Cal. 425; Paige v. O'Neal, Id. 492.

⁷ White v. White, 6 Nev. 20.

⁸ Waggenheim v. Hook, 35 Cal. 216.

⁹ Cal. Code C. P., sec. 661.

¹⁰ Battersby v. Abbott, 9 Cal. 565.

The method of making and settling statements commented on: Levey v. Fargo, 1 Nev. 416.

¹¹ Spanagel v. Dellinger, 38 Cal. 284; Benedict v. Caffé, 3 Duer, 669.

¹² Peck v. Hiler, 30 Barb. 655; Rapelye v. Prince, 4 Hill, 119.

¹³ Cal. Code C. P., sec. 660; Stat. Nev., sec. 198.

trial is not prosecuted with due diligence, it should be dismissed on application,¹ as a failure to prosecute is an abandonment of the motion.² The question of delay held to be in the discretion of the court below, which will not be interfered with unless abuse of discretion clearly appears.³ And where it does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict.⁴ If the judge who tried a cause goes to the county in his district not adjoining the one in which the case was tried, to hold court, before the time for filing amendments to the statement on motion for a new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the judge returns, or first holds court in a county adjoining the one in which the case was tried.⁵

§ 4931. **Argument on Motion.**—On the hearing reference may be had, in all cases, to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file.⁶ The motion can only be heard on the record made and settled before the motion is made;⁷ except when made on the minutes, of the court. After notice of intention, defendants may, at their option, move or not move for a new trial, and if they choose may abandon their proceedings.⁸ But if the statement sets forth the grounds of the motion, and the motion is made and submitted, a refusal to argue the motion is not an abandonment of the same.⁹

§ 4932. **Denial of Motion.**—An order dismissing a motion for a new trial is in effect denying a new trial.¹⁰ Where parties stipulate that a motion be denied, they can not question the correctness of an order denying the same.¹¹ No “exception” lies to overruling a motion for a new trial, nor for entering judgment.¹²

¹ Frank v. Doane and Green v. Doane, 15 Cal. 302; Eckstein v. Calderwood, 27 Id. 413; see Warden v. Mendocino Co., 32 Id. 655; Ward v. Patterson, 46 Pa. St. 372.

² Mahoney v. Wilson, 15 Cal. 42. But see Griffith v. Gruner, 47 Id. 645.

³ Boggs v. Clark, 37 Cal. 237; Chabot v. Tucker, 39 Id. 435; Hopkins v. W. P. R. R. Co., 44 Id. 389.

⁴ Myers v. Casey, 14 Cal. 542.

⁵ Warden v. Mendocino Co., 32 Cal. 655; Simmons v. Goin, 45 Id. 669. Under the present California code of civil procedure, and particularly section 660, it would seem that a notice

of the hearing of the motion would be the proper practice after the statement, bill of exceptions, or affidavits are filed.

⁶ Cal. Code C. P., sec. 660; Weatherbee v. Carroll, 33 Cal. 549.

⁷ Cosgrove v. Johnson, 30 Cal. 509; Quivey v. Gambert, 32 Id. 304.

⁸ Stoyell v. Cole, 19 Cal. 602.

⁹ Carder v. Baxter, 28 Cal. 99.

¹⁰ Warden v. Mendocino Co., 32 Cal. 655.

¹¹ Brotherton v. Hart, 11 Cal. 405.

¹² Pomeroy v. Bank of Ind., 1 Wall. 592. By Cal. Code C. P., sec. 647, it is deemed to have been excepted to.

§ 4933. **Effect of Motion.**—A motion for a new trial filed within the time allowed by law, preserves all rights till it can be heard and determined, and is not effected by the adjournment of the court for the term.¹ But a motion for a new trial does not stay proceedings on the judgment;² nor does it operate as a suspension of an injunction.³ If, after a court has filed its findings of facts, the case is sent to a referee to take an account, the motion does not stay the proceedings pending before the referee.⁴ Nor does the pendency of a motion for new trial stay proceedings so as to deprive the court of the power of vacating an order appointing a receiver made before the trial.⁵ The motion is not equivalent to a new action.⁶ An order granting a new trial is final, and the court can not afterwards vacate it and decide again on the motion.⁷ It vacates the judgment, if any, entered on the verdict or findings set aside, and for that reason an appeal from the judgment can not be entertained.⁸

§ 4934. **Hearing on Motion.**—The fact that instructions given by the court are lost or mislaid before a motion for a new trial is heard is no ground to suspend the hearing of the motion.⁹ It is irregular for the court to reverse its first judgment, and render a contrary one, without hearing or notice.¹⁰ The motion should not be decided before the statement has been settled, engrossed, and certified;¹¹ nor even then without notice to either party or any actual submission of the motion.¹² And where a new trial was prematurely made through inadvertence, held that the order should have been vacated.¹³ The proper place to raise the objection that the statement was not filed in time is in the trial court: it can not be raised for the first time on appeal.¹⁴

§ 4935. **Motion, when Made.**—In proceedings on motion for a new trial, there is no term.¹⁵ The motion may be made before or after entry of judgment, and may be made at the term

¹ *Lurvey v. Wells, Fargo & Co.*, 4 Cal. 106; see *Copper Hill M. Co. v. Spencer*, 25 Id. 16.

² *People v. Loucks*, 28 Cal. 68.

³ *Ortman v. Dixon*, 9 Cal. 23.

⁴ *Crowther v. Rowlandson*, 27 Cal. 376.

⁵ *Copper Hill M. Co. v. Spencer* (No. 1), 25 Cal. 11. As to effect of motion for a new trial in particular cases, see the following: *United States v. Hodge*, 6 How. U. S. 279; *Clark v. Manuf. Ins. Co.*, 2 Woodb. & M. 472; *Brent v. Coyle*, 2 Cranch C. C. 348;

Fraser v. Weller, 6 McLean, 11; *Clark v. Sohler*, 1 Woodb. & M. 368.

⁶ *United States v. Hawkins' Heirs etc.*, 10 Pet. 125.

⁷ *Coombs v. Hibberd*, 43 Cal. 452.

⁸ *Kower v. Gluck*, 33 Cal. 407.

⁹ *Visher v. Webster*, 13 Cal. 58.

¹⁰ *Mitchell v. Hackett*, 14 Cal. 661.

¹¹ *Morris v. De Celis*, 41 Cal. 331.

¹² *De Gaze v. Lynch*, 42 Cal. 362.

¹³ *Hall v. Polack*, 42 Cal. 218.

¹⁴ *Twist v. Kelly*, 11 Nev. 377.

¹⁵ *Spanagel v. Dellinger*, 34 Cal. 476.

or out of the term.¹ But the court has no power to set aside an order denying a new trial after the adjournment of the term.² The motion may be heard at chambers.³ When the judge who tried the cause resides in another county in the same district, it may by consent of parties be heard by such judge at chambers, or in open court in the county of his residence, or in any other county.⁴ A motion for a new trial should not be made while proceedings are pending before a referee.⁵

§ 4936. **Pendency of Motion.**—And if motion be taken under advisement, the court may, in term-time or vacation, order judgment on a verdict rendered and recorded.⁶ But if pending a motion for a new trial taken under advisement for decision in vacation, and a new term intervenes, it is a continuance of the motion, and the court may act on it at its convenience.⁷ If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed.⁸ If no motion is made for a new trial in the court below, the findings of the court and the verdict of the jury are conclusive of the facts.⁹ The provisions of the practice act in relation to motion for new trials have no application to a motion to set aside the report of the commissioners in a proceeding to condemn lands for railroad purposes; and such motion may be properly founded on the report itself, of which the testimony taken by the commissioners properly forms a part.¹⁰ The award in such cases will not be set aside when there is a substantial conflict in the testimony.¹¹

§ 4937. **Parties to Motion.**—One of several parties against whom a judgment is rendered, who does not join in the motion for a new trial, can not complain of alleged error in denying a new trial.¹² If some of the parties against whom the order denying a new trial is rendered do not appeal therefrom, those that appeal must serve on them a notice of appeal, otherwise the supreme court will refuse to entertain the appeal.¹³

¹ Spanagel v. Dellinger, 34 Cal. 476.

² Wilson v. McEvoy, 25 Cal. 169;
Hegeler v. Henckell, 27 Id. 491.

³ Cal. Code C. P., sec. 166.

⁴ Id., sec. 663.

⁵ Crowther v. Rowlandson, 27 Cal. 376.

⁶ Hutchinson v. Bours, 13 Cal. 50.

⁷ Id.; Sheppard v. Wilson, 6 How. U. S. 260.

⁸ Hegeler v. Henckell, 27 Cal. 491.

⁹ Allen v. Fennon, 27 Cal. 68.

¹⁰ W. P. R. R. Co. v. Reed, 35 Cal. 621.

¹¹ Id.

¹² Calderwood v. Brooks, 28 Cal. 151.

¹³ People v. Center, 5 West Coast Rep. 79.

PART TWELFTH.

APPEALS.

CHAPTER I.

APPEALS TO THE SUPREME COURT OF THE UNITED STATES.

§ 4938. **In General.**—All courts having the power to revise and control the judgments and proceedings of inferior courts are technically denominated “appellate courts.” The mode in which this supervisory power is invoked and exercised is not confined, however, to what is strictly called an “appeal.” An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and revisal; but a writ of error is of common-law origin, and removes nothing for re-examination but the law.¹ Where no appeal is allowed by law, the proper method to take a case to an appellate court is by writ of error.² An appeal is allowed from the United States circuit courts and district courts acting as circuit courts, to the supreme court of the United States, in cases of equity, and of admiralty, and maritime jurisdiction, where the matter in dispute exceeds the sum or value of two thousand dollars exclusive of costs.³ An appeal will also lie from a final decree in equity, without regard to the amount in dispute, in any case touching patent rights or copyrights; in actions for the enforcement of any revenue law; in actions against revenue officers; in cases on account of deprivation of rights of citizens, or under the constitution; and in suits for injuries by conspirators against civil rights.⁴ Final judgments at law in the same matters, or class of cases, may be reviewed

¹ *Wiscart v. Dauchy*, 3 Dall. 321; compare *The San Pedro*, 2 Wheat. 132; *United States v. Wouson*, 1 Gall. 512; *United States v. Goodwin*, 7 Cranch, 108.

² *Middleton v. Gould*, 5 Cal. 100; *Haight v. Gay*, 8 Id. 297.

³ U. S. R. S., sec. 692.

⁴ *Id.*, sec. 699.

upon writ of error. Cases tried by the circuit court without the intervention of a jury, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal, and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment.¹

The only mode in which the supreme court of the United States can review a final judgment or decree of a state court is upon writ of error, and such review is confined to cases enumerated in section 709, United States revised statutes. This section is as follows: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority—may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ." The true test as to whether a writ of error lies to the supreme court of the United States, from the final judgment of a state court, is to be arrived at, not from mere averment in the pleadings, but from the matter decided, as developed in the whole record.²

§ 4939. **Procedure on Error.**—"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated tran-

¹ U. S. R. S., sec. 700. Writs of error and appeals from territorial courts are provided for by secs. 702-704. The procedure on error and appeal is provided for by sec. 997 et seq.

² Greely v. Townsend, 25 Cal. 614.

script of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."¹ The writ of error may be issued as well by the clerks of the circuit courts, under the seal of that court, as by the clerk of the United States supreme court; and must be, as nearly as each case will admit, agreeable to the form of a writ of error transmitted by the clerk of the supreme court to the clerks of the several circuit courts.² The record required to be attached to the writ of error is the record of the state supreme court in the cause, being the statement upon which the appeal was taken, with the other matters composing the transcript, together with the judgment of the supreme court, and also a copy of the opinion or opinions filed in the case.³ No formal application for the writ is necessary, as it issues as a matter of course. The party desiring the review is denominated the plaintiff in error, and the opposite party the defendant in error. When the writ is issued by the supreme court of the United States to a state court, the citation to the defendant in error shall be signed by the chief justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days' notice.⁴ Such writs of error shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.⁵ The judge or justice signing the citation shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas*.⁶ The clerk or the supreme court of the United States secures the printing of the record, and charges the parties for a manuscript copy for the printer; and to secure this expense, and his fees in the case, shall require of the plaintiff in error a bond in the penalty of two hundred dollars, or a deposit of that amount to be placed in bank subject to his draft.⁷

The writ of error must be brought within two years after the

¹ U. S. R. S., sec. 997.

² Id., sec. 1004.

³ See rule 8, U. S. Sup. Ct., subd.

2. When the writ shall be returned:
Id., subd. 5. As to docketing case,

etc., see U. S. Supreme Court, rule 9, subd. 1.

⁴ U. S. R. S., sec. 999.

⁵ Id., sec. 1003.

⁶ Id., sec. 1000.

⁷ See rule 10, U. S. Sup. Ct.

entry of the judgment or decree, except where the party entitled to prosecute the writ is an infant, insane person, or imprisoned, in which cases the two years is exclusive of the period of such disability.¹ There shall be no reversal upon a writ of error for error in ruling upon any plea in abatement other than a plea to the jurisdiction of the court, or for any error in fact.² Where both parties appeal but one record is required.³ The supreme court of the United States has no jurisdiction of a case brought up upon an agreed statement of facts without writ of error or appeal.⁴ And the appeal on writ of error must be prosecuted at the next succeeding term.⁵ It has no jurisdiction of an appeal unless the transcript of the record is filed at the next term after the appeal is obtained, though the transcript is filed at the next term after the appeal bond is given, and though the citation recites that the appeal was allowed at the term at which the appeal bond is given.⁶ Amount of judgment is not material on review of decision in the state courts against rights claimed under the laws and treaties of the United States;⁷ as in actions under the revenue laws.⁸

§ 4940. Form of Bond.

Form No. 1156.

SUPREME COURT OF THE UNITED STATES.

A. B., Plaintiff in Error,
 against
C. D., Defendant in Error.

Know all men by these presents, that we, A. B., E. F., and G. H., of, are held and firmly bound unto the said C. D., of, in the sum of dollars, lawful money of the United States, to be paid to the said C. D., his executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this day of, 197..

Whereas, the above-named A. B. hath prosecuted a writ of error to the supreme court of the United States to reverse the judgment rendered by the supreme court of the state of California in a certain action, wherein said C. D. was plaintiff, and said A. B. was defendant [or as the case may be].

¹ U. S. R. S., sec. 1003.

² *Id.*, sec. 1011.

⁸ *Id.*, sec. 1013.

4 Washington Co. v. Durant, 7 Wall. 694; Denhurst v. Coulthard, 3 Dall. 409.

^b **Castro v. United States, 3 Wall. 46.**

⁶Id.; *Edmonson v. Bloomshire*, 7 Wall. 306.

⁷ Buel v. Van Ness, 8 Wheat. 312.

⁸ **United States v. Bromley, 12 How. U. S. 88.**

Now, therefore, the condition of this obligation is such, that if the above-named A. B. shall prosecute his said writ of error to effect, and answer all costs [or, if a *supersedeas* is desired, costs and damages], if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Sealed and delivered }
in presence of }

A. B. [SEAL.]
E. F. [SEAL.]
G. H. [SEAL.]

§ 4941. Citation.

Form No. 1157.

UNITED STATES OF AMERICA—SS.

To C. D., greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be held at Washington, on [the second Monday of October next], pursuant to a writ of error sued out of said court to the [supreme court of the state of California], wherein A. B. is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the said supreme court of the United States, this day of , in the year of our Lord one thousand eight hundred and G. H.,

One of the Justices of the Supreme Court of the United States
[or, Chief Justice of the Supreme Court of the State of California].¹

§ 4942. Chief Justice of State Court may Refuse Citation.—When a final judgment in a suit has been rendered in the highest court of law or equity of a state in which a decision in the suit could be had, and a writ of error has been issued by the clerk of the circuit court of the United States, directed to the judges of the court in which the judgment was rendered, commanding that the record be sent before the supreme court of the United States to be there reviewed, the presiding judge of the court in which the judgment was rendered is not compelled, as a matter of right, to award a citation to the respondent to appear before the supreme court of the United States to maintain the validity of his judgment, but he may look into the record for the purpose of determining whether in his opinion the

¹ It is not deemed necessary to give a form for a writ of error, as the clerks authorized to issue them are supplied with blanks. Those not familiar with the practice should carefully consult the statute and the rules of the supreme court of the United States.

judgment is one from which a writ of error lies, and if he determines that it is not, he may refuse the citation.¹

§ 4943. **United States District Judge.**—The judge of the United States district court for the district of Oregon has no authority, while holding the circuit court of the United States for the district of California, to sign a citation upon a writ of error from the supreme court of the United States to the supreme court of this state; nor has he authority to take and approve of the security required in order to make the writ of error a *superseas*, and operate as a stay of execution upon the judgment to be reviewed.²

CHAPTER II.

APPEALS FROM THE SUPERIOR COURTS TO THE SUPREME COURT.

§ 4944. **When may be Taken.**—Appeals may be taken from the superior courts to the supreme court. From a final judgment: 1. In an action or special proceeding commenced in those courts; 2. In an action or special proceeding brought into those courts from other courts. Or from an order: 1. An order granting or refusing a new trial; 2. An order granting or dissolving an injunction; 3. An order refusing to grant or dissolve an injunction; 4. An order dissolving or refusing to dissolve an attachment; 5. An order changing, or refusing to change, the place of trial; 6. Any special order made after final judgment; 7. And from such interlocutory judgments, in actions for partition, as determine the rights and interests of the respective parties, and direct partition to be made.³

§ 4945. **Appealable Judgments.**—A judgment is the final determination of the rights of the parties in an action or proceeding.⁴ A judgment, to be final, must give relief by its own force, or be enforceable for that purpose without further action by the court.⁵ When an order for judgment has been made and regularly entered by the clerk, and judgment has been drawn up, signed by the judge and filed with the clerk, final judgment has been rendered.⁶ The judgment of an inferior court is final, in the sense indicated above, although the litiga-

¹ Greely v. Townsend, 25 Cal. 608.

² Tompkins v. Mahoney, 32 Cal. 231.

³ Cal. Code C. P., sec. 963; and Id., sec. 939; Solomon v. Reese, 34 Cal. 28; Doherty v. Thayer, 31 Id. 141; For the appellate jurisdiction of the

supreme court of California, see *ante*, secs. 36-49.

⁴ Cal. Code C. P., sec. 577.

⁵ Bondurant v. Apperson, 4 Metc. (Ky.) 30.

⁶ Gray v. Palmer, 28 Cal. 416.

tion may be continued in a higher court upon appeal; but the judgment of a court of last resort is final in another sense, as it conclusively ends the litigation, unless it remands the case to the court below for further proceedings, new trial, or the like. A judgment of the supreme court affirming the judgment below is final.¹ But not on an incidental matter collateral to the suit.

A judgment by default is a final judgment; and as to the right of appeal, there is no distinction between judgments by default and those after issue joined and a trial.² If the complaint exhibits no cause of action, a judgment by default will be reversed.³ But the default confesses all the material facts in the complaint.⁴ In New York the practice differs, and an appeal does not lie from a judgment by default.⁵ So in Nevada, an appeal will not lie from a judgment by default,⁶ unless irregularly and erroneously entered.⁷

• § 4946. **Case Stated.**—An appeal lies from a judgment upon an agreed statement of facts, on an *audita querela*.⁸ From judgment on a case submitted in writing for trial, without the intervention of a jury, if no exceptions are taken, no appeal lies.⁹

§ 4947. **Case Submitted without Action.**—A case submitted without action¹⁰ may be determined and judgment rendered thereon as if an action was pending, and is subject to appeal.¹¹ The case, the submission, and a copy of the judgment constitute the judgment roll.¹²

§ 4948. **Consent.**—A judgment or order entered by consent is not appealable,¹³ not even under a stipulation to that effect.¹⁴ Mere passiveness or silence is not consent such as to bar an appeal.¹⁵ An stipulation not to appeal will be enforced.¹⁶ But

¹ Mulford v. Estudillo, 32 Cal. 131.

² Stevens v. Ross, 1 Cal. 94; Burt v. Scrantom, Id. 416; People v. Woodlief, 2 Id. 241; Hallock v. Jaudin, 34 Id. 167; Holman v. Sigourney, 11 Met. 436; Ball v. Burke, 11 Cush. 80; Henderson v. Gibson, 19 Md. 234.

³ Abbe v. Marr, 14 Cal. 210; Choynski v. Cohen, 39 Id. 502.

⁴ Rowe v. Table Mt. etc. Co., 10 Cal. 444.

⁵ See N. Y. Code, 1877, sec. 1294; Flake v. Van Wagenen, 54 N. Y. 25; Miller v. Tyler, 58 Id. 477; Inness v. Purcell, Id. 388.

⁶ Paul v. Armstrong, 1 Nev. 82.

⁷ Kidd v. The Four Twenty Mfg. Co., 3 Nev. 381.

⁸ Hovey v. Crane, 10 Pick. 440; Parker v. Inhabitants of Framingham, 8 Met. 260; Furlong v. Leary, 8 Cush. 409; White v. Clapp, 8 Allen, 283.

⁹ Bass v. Haverhill Ins. Co., 10 Gray, 400.

¹⁰ Under Cal. Code C. P., sec. 1138.

¹¹ Id., sec. 1140.

¹² Id., sec. 1139.

¹³ Meerholz v. Sessions, 9 Cal. 277; approved in Brotherton v. Hart, 11 Id. 405; Mills v. Brown, 16 Pet. 525; Sampson v. Welch, 24 How. U. S. 207; Lambert v. Moore, 1 Nev. 231; Boyd v. Bigelow, 14 How. Pr. 511; Van Wormer v. Mayor of Albany, 15 Wend. 169; O'Dougherty v. Aldrich, 5 Denio, 385.

¹⁴ Kelsey v. Forsyth, 21 How. U. S. 85; Jarvis v. Palmer, 1 Barb. Ch. 379; Perkins v. Farnham, 10 How. Pr. 120.

¹⁵ San Francisco v. Certain Real Estate, 42 Cal. 518.

¹⁶ Townsend v. Masterson Stone D. Co., 15 N. Y. 587.

such agreement must be based on some consideration, or the facts must estop the party from exercising the right.¹

§ 4949. **Costs.**—A judgment for plaintiff for costs only may be appealed from.² In Massachusetts, if the court of common pleas disallowed the defendant's motion for costs upon a discontinuance of a suit, an appeal would lie.³ Where judgment was rendered for defendant for costs, "but no final determination of the rights of the parties in the action," it is not a final judgment, and no appeal will lie.⁴ In an action for libel the plaintiff recovered a verdict for one hundred dollars. The plaintiff filed his bill of costs, amounting to two hundred and seventy-eight dollars, and had judgment for verdict and costs. Defendant moved to strike out the cost bill from the files, because the verdict was for less than three hundred dollars. The motion was denied. On appeal from the order denying the motion, it was held that the motion, if granted, would have effected a modification of the judgment, and that the order refusing the motion could only be reviewed on an appeal from the judgment.⁵

§ 4950. **Nonsuit.**—An appeal lies from a judgment of nonsuit; but an appeal will not lie from a judgment after a new trial has been granted,⁶ or from judgment of nonsuit entered on the motion of the party.⁷ No motion for new trial is necessary.⁸

§ 4951. **Partition.**—An appeal may be taken from such interlocutory judgment, in actions for partition, as determines the rights and interests of the respective parties, and directs partition to be made.⁹ If the interlocutory judgment in partition adjudges that one of the parties has no interest in the property, it is not a final judgment as to him, from which he can appeal.¹⁰ In Massachusetts, the judgment accepting the report of commissioners, in a petition for partition, is not appealable.¹¹ In Missouri, a decree that partition be made between the parties is interlocutory, and no appeal will lie.¹²

¹ *Ogdensburg & L. C. R. R. Co. v. Vermont & C. R. R. Co.*, 63 N. Y. 176.

² *Meeker v. Harris*, 23 Cal. 285; *McDaniels v. Johnson*, 36 Vt. 687; *McGregor v. Comstock*, 19 N. Y. 581. Cases in which it is said no appeal will lie upon a mere question of costs, as being in the discretion of the court, are *Rogers v. Holly*, 18 Wend. 350; *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Travis v. Waters*, 12 Johns. 500.

³ *Gilbreth v. Brown*, 15 Mass. 178.

⁴ *McAlpin v. Bennett*, 21 Tex. 535; *Walmer v. Schulemberger*, 23 Ind. 454.

⁵ *Flubacher v. Kelly*, 49 Cal. 116, citing *Lasky v. Davis*, 32 Id. 677.

⁶ *Kower v. Gluck*, 33 Cal. 401.

⁷ *Imley v. Beard*, 6 Cal. 666; *Sleeper v. Kelly*, 22 Id. 456; *Van Wormer v. Mayor of Albany*, 18 Wend. 169; *O'Dougherty v. Aldrich*, 5 Denio, 385.

⁸ *Cravens v. Dewey*, 13 Cal. 42.

⁹ Cal. Code C. P., sec. 963.

¹⁰ *Peck v. Vandenberg*, 30 Cal. 11. But see the section of the code, cited *supra*.

¹¹ *Pierce v. Oliver*, 13 Mass. 211; but see R. S. of Mass., c. 103, sec. 19.

¹² *McMurtry v. Glascock*, 20 Mo. 432; *Stephens v. Hume*, 25 Id. 349.

§ 4952. **Special Proceedings.**—A judgment finding the amount due on a mortgage, and directing a sale of the mortgaged premises, may be appealed from.¹ In proceeding to condemn land, the decision of the court by which the merits of the matter are finally determined is a final judgment in a special proceeding, from which an appeal can be taken, and can not be reviewed on writ of error.² A judgment of the supreme court, compelling a board of supervisors to execute and deliver to the Central Pacific Railroad Company bonds of said city and county, as specified in the act of California of April 22, 1863, was a final judgment.³ An appeal may be taken from a judgment rendered by a district judge at chambers in an action of *mandamus*, *certiorari*, or *quo warranto*, or in a special proceeding to try the validity of a corporation election.⁴

§ 4953. **Void Judgment.**—An appeal may be taken from a void judgment.⁵ One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times.⁶

§ 4954. **Appealable Decrees.**—To authorize an appeal, the decree must be final on all matters within the pleadings, so that the affirmance of the decree will end the suit.⁷ A decree providing for the subsequent collection of money, sale of stock, and payment in accordance with the decree, is still a final decree.⁸ A decree is final if it decides the ownership of the property in suit, and directs its immediate transfer, though accounts remain to be taken between the parties.⁹ A decree adjudging that the defendant pay a certain sum into court, or in default thereof that a receiver be appointed, is a final decree.¹⁰ A decree of the district court in admiralty, refusing to order the sale of a vessel as petitioned by one of two part owners, is a final decree.¹¹ The decrees in the district court on California land surveys under the acts of congress are final.¹² Thus from a

¹ Swan's Pr. & Pl. 238.

² Sacramento P. & N. R. R. Co. v. Harlan, 24 Cal. 334; San Francisco and San Jose R. R. Co. v. Mahoney, 29 Id. 112.

³ People v. Coon, 25 Cal. 635.

⁴ Brewster v. Hartley, 37 Cal. 15.

⁵ Hastings v. Burning Moscow Co., 2 Nev. 93; Gormly v. McIntosh, 22 Barb. 271; Commonwealth v. O'Neil, 6 Gray, 343; compare Malone v. Clark, 2 Hill, 657; Randall v. Hall, Hill & D. Supp. 239; Edwards v. Russell, 21 Wend. 63; Striker v. Mott, 6 Id. 465; Fairbanks v. Corlies, 1 Abb. Pr. 150.

⁶ Kamp v. Kamp, 59 N. Y. 212.

⁷ Perkins v. Fourniquet, 6 How. U. S. 206, 209; Craighead v. Wilson, 18 Id. 199.

⁸ Neall v. Hill, 16 Cal. 145.

⁹ Thompson v. Dean, 7 Wall. 342; see Forgay v. Conrad, 6 How. U. S. 201.

¹⁰ Wabash and Erie Canal Co. v. Beers, 1 Black, 54; Heroy v. Gibson, 10 Bosw. 591; Bailey v. Lane, 15 Abb. Pr. 373.

¹¹ Davis v. The Seneca, Gilp. 34.

¹² United States v. Billing, 2 Wall. 444; The Fossac Case, Id. 649.

decree rendered in a suit for divorce an appeal lies;¹ and a decree for the foreclosure and sale of mortgaged premises is a final decree before the return and confirmation.² An appeal will lie from a confirmation of a sale in a mortgage case.³ A decree in a suit to enjoin trustees from selling, dissolving an injunction before granted, and ordering that they shall sell and bring the proceeds into court to abide further orders, is a final decree, from which an appeal lies, within the meaning of the act of 1803.⁴

§ 4955. **Non-appealable Decrees.**—In chancery a decree is interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision. But when a decree finally decides and disposes of the whole merits of the cause, it is a final decree.⁵ A decree ordering a reference and an accounting, and reserving all other matters in controversy, is not final.⁶ A general decree, before the funds are collected, that they shall be distributed among certain parties, and appointing a master to state an account, is not a final decree.⁷ A decree of the supreme court, simply reversing the decree made by an inferior court, and remitting the cause for further proceedings, is not final.⁸ Where restitution, with costs and damages, have not been assessed, the decree is not final.⁹ A decree that a sum of money is due, but leaving the amount dependent upon other claims, is not final.¹⁰ Where the decree of the district court was not final, the circuit court to which the cause was taken by appeal had no power to act upon the case, nor could it consent to an amendment of the record by the insertion of a final decree by agreement of counsel, nor can this court consent to such an amendment.¹¹ A supplemental decree of sale is but a decree in execution of the original decree, and not final;¹² nor is a subse-

¹ Conant v. Conant, 10 Cal. 249.

² Whiting v. Bank of the U. S., 13 Pet. 6; Bronson v. Railroad Co., 2 Black, 524; Ray v. Law, 3 Cranch, 179; Railroad Co. v. Soutter, 2 Wall. 440; Tripp v. Cook, 26 Wend. 143.

³ Hey v. Schooley, 7 Ohio, 373; Kern's Adm'r v. Foster, 16 Id. 274.

⁴ Railroad Co. v. Bradleys, 7 Wall. 575.

⁵ Mills v. Hoag, 7 Paige Ch. 18; Beebe v. Russell, 19 How. U. S. 283.

⁶ Id.; Craighead v. Wilson, 18 How. U. S. 199; Dows v. Congden, 28 N. Y. 122.

⁷ Ogilvie v. Knox Ins. Co., 2 Black, 539.

⁸ The Palmyra, 10 Wheat. 502; Chace v. Vasquez, 11 Id. 429; Barnard v. Gibson, 7 How. U. S. 650;

Coffee v. Planters' B'k, 13 Id. 11; Craighead v. Wilson, 18 Id. 199; Harvey v. Richards, 2 Gall. 216; Pepper v. Dunlap, 5 How. U. S. 51; Humiston v. Stainthop, 2 Wall. 106; Winn's Heirs v. Jackson, 12 Wheat. 135; Corning v. Troy Iron and Nail Factory, 15 How. U. S. 451; Griffin v. Orman, 9 Fla. 22; Owens v. Love, Id. 325.

⁹ The Palmyra, 10 Wheat. 502; distinguishing Ray v. Law, 3 Cranch, 179; Chase v. Vasquez, 11 Wheat. 429.

¹⁰ Montgomery v. Anderson, 21 How. U. S. 386.

¹¹ Mordecai v. Lindsay, 19 How. U. S. 199.

¹² Carr v. Hoxie, 13 Pet. 460.

quent decree of possession, to put buyer in possession of property sold.¹ A decree dismissing a cross-bill alone is not final.²

§ 4956. **Appealable Orders.**—There are certain orders which by the statute are made appealable, while others can only be reviewed upon an appeal from the judgment.³ Intermediate orders, which are not appealable, may be reviewed, if excepted to, upon appeal from the judgment.⁴ An order made by the court, on a motion, is a final adjudication upon the subject-matter, unless appealed from within the statutory time.⁵ So an order or judgment upon an award, when such order or judgment is founded upon matter of law apparent on the record, may be appealed from.⁶ Any judgment, order, or decree which puts an end to the proceedings may be appealed from; as an order of the county court dismissing an appeal.⁷

The following are orders involving a substantial right, and which are appealable in the states where the decisions were made:

§ 4957. **Amendment.**—An order authorizing the insertion in a complaint of an entirely different cause of action involves a substantial right, and is appealable.⁸ In New York, an appeal will not lie from an order granting or refusing an amendment,⁹ or imposing terms on granting an amendment,¹⁰ or modifying judgment after actual entry.¹¹

§ 4958. **Attachment.**—From an order dissolving or refusing to dissolve an attachment, an appeal will now lie.¹² A judgment giving priority to one creditor over another, as to attached funds of a debtor, but not distributing or giving any other relief to the parties, is not a final order.¹³

§ 4959. **Bill of Particulars.**—An order directing a bill of particulars, as regards extent to which they are to be furnished,

¹ Callan v. May, 2 Black, 541.

² Ayres v. Carver, 17 How. U. S. 591.

³ The appealable orders are enumerated in Cal. Code C. P., sec. 939, subd. 3, and sec. 963, subd. 2; N. Y. Code, sec. 1347.

⁴ Hibberd v. Smith, 39 Cal. 145; Agard v. Valencia, Id. 292.

⁵ Kittredge v. Stevens, 23 Cal. 283.

⁶ Skeels v. Chickering, 7 Met. 316; Ward v. American Bank, Id. 486.

⁷ Zoller v. McDonald, 23 Cal. 136.

⁸ Sheldon v. Adams, 41 Barb. 54; S. C., 18 Abb. Pr. 405.

⁹ N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357; S. C., 21 How. Pr. 296; Audubon v. Excelsior Ins. Co., 27 N. Y.

216; Bennard v. Spring, 42 Barb. 470; Thompson v. Kessel, 30 N. Y. 383; McCarty v. Edwards, 24 How. Pr. 236; Mitchell v. Van Buren, 27 N. Y. 300; Walsh v. Washington Ins. Co., 32 Id. 427.

¹⁰ Schermerhorn v. Wood, 30 How. Pr. 316; Sheets v. Selden, 7 Wall. 416.

¹¹ Butler v. Niles, 28 How. Pr. 181; but see Bryan v. Berry, 8 Cal. 130, and Code C. P., sec. 939.

¹² Cal. Code C. P., sec. 939; changing the practice as reported in Allender v. Fritts, 24 Cal. 447; Howell v. Kingsbury, 15 Wis. 272.

¹³ Hanson v. Bowyer, 4 Metc. (Ky.) 108.

is appealable.¹ But refusal to allow service of such bill of particulars after time expired is discretionary, and not appealable.²

§ 4960. **Contempt.**—A commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by a superior court.³ In a later case it was held that an appeal may be taken from a judgment for contempt, where the fine imposed is for three hundred dollars, and the court below has exceeded its jurisdiction; the question of jurisdiction being always open for review, and that where all the facts do not appear of record, and would not be brought up on *certiorari*, appeal upon a statement is the proper remedy.⁴ But the point was not decided, whether a judgment for contempt rendered by a court having jurisdiction to render it may be reviewed for mere error.⁵

§ 4961. **Decree, Setting Aside.**—An appeal lies from an order setting aside a decree in equity, and granting a rehearing.⁶ In Pennsylvania, an order founded on a previous decree to pay money can not be appealed from.⁷

§ 4962. **Dismissal of Action.**—An order dismissing an action after issue joined is appealable;⁸ or from a judgment, upon a plea of abatement.⁹ But it does lie where dismissal was on matters of law apparent on the record.¹⁰ If an action is improperly dismissed by the plaintiff, the defendant's remedy is by appeal from the judgment, and not by motion to set it aside.¹¹

§ 4963. **Foreclosure.**—In Wisconsin, an order that an action for the foreclosure of a mortgage should be referred for the purpose of taking testimony involves the merits of the action, and may be appealed from.¹²

§ 4964. **Injunction.**—An appeal may be taken from an order granting or dissolving, or refusing to grant or dissolve, an injunction.¹³ An appeal from an interlocutory order granting a temporary injunction will not be sustained when such order was superseded by a final decree before appeal taken.¹⁴ So it

¹ Mason v. Ring, 10 Bosw. 598.

² Goings v. Patten, 1 Daly, 168.

³ Ex parte Rowe, 7 Cal. 175. An appeal will lie: Ware v. Robinson, 9 Id. 107.

⁴ People v. O'Neill, 47 Cal. 109.

⁵ See Aram v. Shallenberger, 42 Cal. 275; Pease v. King, 9 How. Pr. 97.

⁶ Riddle v. Baker, 13 Cal. 295; Michigan Ins. Co. v. Whittimore, 12 Mich. 311.

⁷ Chew's Appeal, 3 Grant, 294.

⁸ Purple v. Clark, 5 Pick. 206.

⁹ Browning v. Bancroft, 5 Met. 88; Morey v. Whittenton Mills, 8 Cush. 374.

¹⁰ Hovey v. Crane, 10 Pick. 440; Bowler v. Palmer, 2 Gray, 553.

¹¹ Higgins v. Mahoney, 50 Cal. 444.

¹² Oatman v. Bond, 15 Wis. 20.

¹³ Cal. Code C. P., sec. 939.

¹⁴ Easterbrook v. Upton, 1 Nev. 398.

seems a decree for an injunction in a patent case, and a reference to a master to take an account of profits, is not final.¹ So a decree merely dissolving an injunction, without dismissing the bill, is not final.² A decree of the highest court of a state, affirming the decretal order of a state court refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the meaning of the twenty-fifth section of the judiciary act of 1789, from which an appeal lies to the supreme court of the United States.³

§ 4965. **Judgment, Entry of.**—An order allowing a motion for the signing of a judgment *nunc pro tunc*, improperly allowed, is appealable.⁴ Orders setting aside, or refusing to set aside, judgments or sales under them are, in Wisconsin, appealable.⁵ So in Nevada.⁶ An appeal lies from an order of the court below changing the judgment.⁷ The practice in New York seems to be different.⁸

§ 4966. **Judicial Errors.**—If, in acting judicially, the court commits an error, the remedy is by appeal, and not by *mandamus*.⁹ For an error in law excepted to, an appeal lies without motion for a new trial.¹⁰ Where certain evidence, which was essential to sustain a party's defense, was erroneously excluded, although no evidence whatever on another point likewise essential to his defense, but not available for that purpose in the absence of said excluded evidence, such error is prejudicial, and ground for reversal on appeal of a judgment rendered against him.¹¹

§ 4967. **New Trial.**—An appeal may be taken from an order granting or refusing a new trial;¹² but the motion must have been prosecuted before the district court.¹³ Such an appeal brings up the whole record.¹⁴ Without such an appeal the su-

¹ *Bernard v. Gibson*, 7 How. U. S. 650; distinguishing *Forgay v. Conrad*, 6 Id. 201.

² *McCollum v. Eager*, 2 How. U. S. 61; *Young v. Grundy*, 6 Cranch, 51; *Hiriart v. Ballon*, 9 Pet. 156; *Gibbons v. Ogden*, 6 Wheat. 448; *Brown v. Swann*, 9 Pet. 1.

³ *Gibbons v. Ogden*, 6 Wheat. 448.

⁴ *Fairchild v. Dean*, 15 Wis. 206.

⁵ *Carney v. La Crosse R. R. Co.*, 15 Wis. 503; *Jessup v. City Bank of Racine*, Id. 604.

⁶ *Ballard v. Purcell*, 1 Nev. 342; *Maynard v. Johnson*, 2 Id. 16. In New York: see *Mortimer v. Nash*, 17 Abb. Pr. 229.

⁷ *Bryan v. Berry*, 8 Cal. 130; Cal. Code C. P., sec. 939, subd. 3.

⁸ See *Butler v. Niles*, 28 How. Pr. 181.

⁹ *People v. Pratt*, 28 Cal. 166.

¹⁰ *Rice v. Gashirrie*, 13 Cal. 53; Cal. Code C. P., sec. 956.

¹¹ *Jolley v. Foltz*, 34 Cal. 321.

¹² Cal. Code C. P., sec. 939; N. Y. Code, sec. 1347; *Ketchum v. Crippen*, 31 Cal. 365; *Adams v. Bush* (No. 1), 2 Abb. Pr., N. S., 104.

¹³ Cal. Code C. P., sec. 963; *Mahoney v. Wilson*, 15 Cal. 42; *Frank v. Doane*, Id. 303; *Green v. Doane*, Id. 304.

¹⁴ *Hanscom v. Tower*, 17 Cal. 518; *Walden v. Murdock*, 23 Id. 540.

preme court can not review the evidence to determine whether the verdict or findings are sustained by it.¹

§ 4968. **Receiver.**—An appeal lies from an order refusing to appoint a receiver in proceedings supplementary to execution against a judgment debtor.² An order setting aside or opening the biddings on a judicial sale, regular in itself, is not appealable;³ or an order denying a stay of trial in one cause until determination of another;⁴ or refusal to adjourn the hearing before a referee.⁵

§ 4969. **Reference.**—Granting reference in cases not properly referable is appealable;⁶ or for refusing to enter decree on report of referee.⁷

§ 4970. **Special Orders after Judgment.**—An appeal may be taken from any special order made after final judgment.⁸ Appeals from orders after judgment are allowed to correct erroneous proceedings subsequent to and founded on a good judgment.⁹ In Massachusetts an appeal lies from a decision of a court of common pleas arresting judgment in a civil action;¹⁰ an order made by judge at chambers setting aside an execution and perpetually staying the enforcement of the same;¹¹ or from an order refusing the issuance of an execution, on the grounds of a counter-judgment without opposition, to test the right to have the application granted;¹² or an order refusing to quash an execution;¹³ but not from an order that execution issue.¹⁴ An appeal lies from a judgment on a rule of court dismissing an opposition to an order of seizure and sale.¹⁵ The act of the district judge in granting an order of seizure and sale is a judicial act from which an appeal will lie;¹⁶ or an order denying attachment against party refusing to be examined in supplementary proceedings.¹⁷ An order denying a motion to dismiss a motion for new trial may be appealed from, and can not be considered

¹ *Green v. Butler*, 26 Cal. 595; *Clark v. Gridley*, 49 Id. 105.

² *Heroy v. Gibson*, 10 Bosw. 591; *Bailey v. Lane*, 15 Abb. Pr. 373.

³ *Hazleton v. Wakeman*, 3 How. Pr. 357; *Wakeman v. Price*, 3 Comst. 334; *Buffalo Savings Bank v. Newton*, 23 N. Y. 160.

⁴ *James v. Chalmers*, 2 Seld. 209.

⁵ *Carpenter v. Haynes*, 1 N. Y. Code R. 414.

⁶ *Whitaker v. Desfosse*, 7 Bosw. 678; *Harris v. Mead*, 16 Abb. Pr. 257; *Dickenson v. Mitchell*, 19 Id. 286.

⁷ *Ludlum v. Fourth District Court*, 9 Cal. 7.

⁸ Cal. Code C. P., sec. 963.

⁹ *Howard v. Richards*, 2 Nev. 128.

¹⁰ *Bemis v. Faxon*, 2 Mass. 141.

¹¹ *Bond v. Pacheco*, 30 Cal. 530.

¹² *Belts v. Garr*, 26 N. Y. 383; *Horton v. Miller*, 44 Pa. St. 256; see *Shuman v. Strauss*, 52 N. Y. 404.

¹³ *Gilman v. Contra Costa Co.*, 8 Cal. 52; *Cooley v. Gregory*, 10 Wis. 303.

¹⁴ *Mount v. Mitchell*, 31 N. Y. 356.

¹⁵ *Hoft v. Kelty*, 17 La. Ann. 144.

¹⁶ *Commissioners v. Marks*, 16 La. Ann. 112.

¹⁷ *Holstein v. Rice*, 24 How. Pr. 135.

upon an appeal from an order granting a new trial under the motion sought to be dismissed.¹

§ 4971. **Striking out.**—An order striking out from the answer matter constituting a good defense, is reviewable on appeal from the final judgment.²

§ 4972. **Supplemental Complaint.**—An order allowing a supplemental complaint to be made may be appealed from.³ Under the statute of Minnesota an appeal lies from a decision of referees appointed to assess damages for the occupation of complainant's land;⁴ or from the decision of the county commissioners in a controversy about a ferry.⁵

§ 4973. **Suspending Attorney.**—An order by a district court suspending or removing an attorney is appealable.⁶

The following are non-appealable orders in the states where the decisions were rendered:

§ 4974. **Discretion of Court.**—An order or matter resting in the discretion of the court, or a question of pure practice, does not involve the merits, and is not appealable;⁷ as an order granting or refusing a favor.⁸ But the refusal to exercise discretion on the ground of want of power is error of law, and a ground of appeal;⁹ or a palpable abuse of discretion;¹⁰ or mistake;¹¹ or an order in statutory proceedings, where limits imposed by the legislature on the exercise of discretion are exceeded.¹²

§ 4975. **Discretionary Orders—Parties.**—An appeal will not lie from the refusal of the court to permit a party to be made co-defendant;¹³ or from an order making a new party defendant;¹⁴ or an order denying a motion for leave to intervene.¹⁵ A motion to renew an action, made with notice to the surviving defendant only, and denied, can not be appealed from.¹⁶

§ 4976. **Discretionary Orders—Transfer.**—An appeal lies

¹ *Macy v. Davila*, 48 Cal. 646.

² *Rapalee v. Stewart*, 27 N.Y. 310.

³ *Cheeseman v. Sturges*, 19 Abb. Pr. 293.

⁴ *Paddox v. St. Croix Corporation*, 8 Minn. 277; *Ames v. Mississippi etc. Co.*, Id. 467.

⁵ *Carothers v. Wheeler*, 1 Or. 194.

⁶ Cal. Code C. P., sec. 287, subd. 5.

⁷ *Jorgensen v. Boehmer*, 9 Minn. 181; *Vincent v. Wellington*, 18 Wis. 159; *Cushman v. Brundett*, 50 N. Y. 296; *White v. Coulter*, 59 Id. 629.

⁸ *Fort v. Bard*, 1 Comst. 43; *Mead v. Mead*, 2 E. D. Smith, 223.

⁹ *Tilton v. Beecher*, 59 N. Y. 176;

Equitable L. Ins. Co. v. Stevens, 63 Id. 341; *Morris v. Wheeler*, 45 Id. 708; *The King v. The Justice etc.*, 14 East, 395.

¹⁰ *Platt v. Kelly*, 16 Abb. Pr. 188; *Fredericks v. Taylor*, 52 N. Y. 596; S. C., 14 Abb. Pr., N. S., 77.

¹¹ *Fields v. Moul*, 15 Abb. Pr. 6.

¹² *In re Livingston's Petition*, 34 N. Y. 555.

¹³ *Roberts v. Patton*, 18 Mo. 485.

¹⁴ *Beck v. San Francisco*, 4 Cal. 375.

¹⁵ *Wenborn v. Boston*, 23 Cal. 321; *Scheidt v. Sturgis*, 10 Bosw. 606.

¹⁶ *Union Bank v. Mott*, 27 N. Y. 633.

from an order refusing to transfer a cause from a state court to a federal court, because of alienage of defendant.¹

§ 4977. **Discretionary Orders—Practice.**—No appeal lies from an order regulating a mode of proceeding, and within the judicial discretion.² So of an order or decision as to right to begin or close case;³ or an order suspending trial to bring in further evidence;⁴ or an order staying proceedings until further direction of the court;⁵ from an order restoring the cause to the calendar for trial;⁶ from an order of court refusing to set aside a former order.⁷ When two orders are made, the latter affirming the former, appeal must be made from the latter.⁸ The party can not fall back, and seek to reverse the order by a direct appeal.⁹ No appeal lies from an order of court refusing to set aside an interlocutory judgment;¹⁰ or an order granting leave to renew a motion;¹¹ or an order refusing to dismiss a cause for want of prosecution is not appealable.¹² But the dismissal of an action is final;¹³ or an order refusing to substitute assignee *pendente lite* as party;¹⁴ or striking out cause from general term calendar;¹⁵ or an order refusing a continuance.¹⁶

§ 4978. **Interlocutory Orders.**—An order which does not determine the controversy, but leaves it to proceed, is not appealable.¹⁷ An appeal will not lie from an interlocutory order, except in cases provided by statute;¹⁸ or an order denying a rehearing of a decree of this nature.¹⁹ An appeal does not lie from an order for judgment on a frivolous answer;²⁰ or an order striking out scandalous matter;²¹ or striking out an answer as

¹ Hopper v. Kalkman, 17 Cal. 517; Brooks v. Calderwood, 19 Id. 124.

² McCoun v. N. Y. C. & H. R. R. Co., 50 N. Y. 176; Arthur v. Griswold, 60 Id. 143.

³ Fry v. Bennett, 28 N. Y. 324.

⁴ Phelps v. Ward, 10 Bosw. 617.

⁵ Rhodes v. Craig, 21 Cal. 419.

⁶ Dimick v. Deringer, 32 Cal. 488.

⁷ Gates v. Walker, 35 Cal. 289; Hastings v. Cunningham, 35 Id. 549; Culver v. Hollister, 17 Abb. Pr. 405.

⁸ Horn v. Volcano Water Co., 18 Cal. 141.

⁹ Id.

¹⁰ Stearns v. Marvin, 3 Cal. 376.

¹¹ Smith v. Spaulding, 30 How. Pr. 339.

¹² Waldo v. Rice, 18 Wis. 404; Lamphear v. Lamprey, 4 Mass. 107.

¹³ Tappan v. Bruen, 5 Mass. 193; Wood v. Ross, 11 Id. 275.

¹⁴ Packard v. Wood, 17 Abb. Pr. 318.

¹⁵ Cotes v. Smith, 31 How. Pr. 146.

¹⁶ Haraszthy v. Horton, 40 Cal. 546.

¹⁷ Illius v. N. Y. & N. H. R. R. Co., 3 Kern. 597; Kanouse v. Martin, 6 How. Pr. 240; Duane v. Northern R. Co., 3 Comst. 545.

¹⁸ People v. Thurston, 5 Cal. 517; Juan v. Ingoldsby, 6 Id. 439; De Barry v. Lambert, 10 Id. 503; Baker v. Baker, Id. 527; Harris v. Clark, 4 How. Pr. 78; Cruger v. Douglass, 2 Comst. 571; Chittenden v. Missionary Society, 8 How. Pr. 327; Swarthout v. Curtis, 4 Comst. 415.

¹⁹ King v. Merchants' Exchange Co., 1 Seld. 547.

²⁰ Dunham v. Nicholson, 4 How. Pr. 140; see also Wilkin v. Raplee, 52 N. Y. 248.

²¹ Opdyke v. Marble, 18 Abb. Pr. 375.

sham or irrelevant;¹ or an order for judgment on partial demurrer;² or an order overruling a demurrer;³ or an order sustaining a demurrer.⁴ In Minnesota, under the statute of 1861, an appeal is allowed from any order made upon a demurrer.⁵ So in Massachusetts, for the cause that the declaration does not state a legal cause of action.⁶ An appeal in a criminal case may be taken from an order allowing a demurrer, though final judgment be not entered.⁷ An appeal does not lie from an order entering a default;⁸ an order dismissing an action as to one party, made before judgment;⁹ an order dismissing a cross-complaint on demurrer to the same;¹⁰ an order made before judgment, staying all proceedings until further order.¹¹

§ 4979. **Interlocutory Orders—Costs.**—An appeal does not lie from an order correcting an award of costs on *certiorari*;¹² or awarding costs against executor refusing to refer;¹³ or requiring a receiver to give security for costs;¹⁴ or from an order made on a motion to retax costs. The error can be revised only on an appeal from the judgment;¹⁵ or an order allowing costs on a peremptory *mandamus*;¹⁶ or an order made on motion to open a judicial sale on grounds not affecting the regularity of the proceedings;¹⁷ or an order for an extra allowance of costs.¹⁸

§ 4980. **Interlocutory Orders—Evidence.**—An appeal does not lie from a decision that a deposition is or is not regularly taken;¹⁹ or from an order refusing to issue a commission to take testimony;²⁰ or an order striking out interrogatories attached to a pleading;²¹ or an order admitting affidavits on motion;²² or stopping cross-examination, unless in case of manifest abuse or injustice.²³

§ 4981. **Interlocutory Orders—New Trial.**—An appeal

¹ Briggs v. Bergen, 23 N. Y. 162; Hanover F. Ins. Co. v. Tomlinson, 58 Id. 651; Tabor v. Gardner, 41 Id. 232.

² Paddock v. Springfield F. & M. Ins. Co., 2 Kern. 591.

³ Bennett v. Nichols, 12 Mich. 22; Ford v. David, 13 How. Pr. 193; Rutherford v. Fisher, 4 Dall. 22.

⁴ Rutherford v. Fisher, 4 Dall. 22; McClay v. Hanna, Id. 160; Miners' Bank v. United States, 5 How. U. S. 215; Blakely v. Fisk, Hempst. 11.

⁵ St. Paul Division v. Brown, 9 Minn. 151.

⁶ Amherst R. R. Co. v. Watson, 4 Gray, 61.

⁷ People v. Logan, 1 Nev. 110.

⁸ Ricketson v. Compton, 23 Cal. 650.

⁹ Dimick v. Deringer, 32 Cal. 492.

¹⁰ Daniels v. Lansdale, 38 Cal. 567.

¹¹ Rhodes v. Craig, 21 Cal. 419.

¹² People v. Robinson, 25 How. Pr. 345.

¹³ Niblo v. Binsse, 31 How. Pr. 476.

¹⁴ Bolles v. Duff, 17 Abb. Pr. 448.

¹⁵ Laskey v. Davis, 33 Cal. 677.

¹⁶ People v. Albright, 14 Abb. Pr. 305.

¹⁷ Kingsland v. Bartlett, 28 Barb. 480.

¹⁸ Krekeler v. Ritter, 62 N. Y. 372.

¹⁹ Hix v. Fisher, 1 Wins. (N. C.) L. No. 2, 84.

²⁰ People v. Stillman, 7 Cal. 117.

²¹ Davenport Co. v. Davenport, 15 Iowa, 6.

²² Childs v. Fox, 18 Abb. Pr. 112.

²³ Great Western Turnpike Co. v. Loomis, 32 N. Y. 127.

does not lie from an order denying motion for new trial on ground of surprise;¹ or refusing to amend an order allowing time to move for a new trial;² or striking out or refusing to strike out a statement made on motion for a new trial;³ or from an order denying a motion to certify a statement;⁴ or directing such statement to be settled.⁵ Upon a bill for relief against a judgment at law, a decree granting a new trial on terms, and not dismissing the bill on making the injunction perpetual, is an interlocutory order, and not appealable.⁶

§ 4982. **Interlocutory Orders — Receiver.** — An appeal does not lie from an order directing a receiver to distribute the funds in his hands, unless it is the final result of the proceeding;⁷ or as to appointment or substitution of receiver;⁸ or refusal to allow receiver to commence action.⁹

§ 4983. **Interlocutory Orders — Reference.** — An appeal does not lie from an order granting a reference in referable causes;¹⁰ or the findings of a referee in a divorce case;¹¹ or as to decisions of a referee in relation to alimony;¹² or directly to an order overruling exceptions to a referee's report;¹³ or an order vacating an order of reference.¹⁴

§ 4984. **Interlocutory Orders — Vacating Judgment.** — An appeal lies direct from a judgment, but not from an order refusing to set it aside¹⁵ on the ground of irregularity.¹⁶ But an order vacating a judgment by confession, on account of a defect in the statement, was held appealable;¹⁷ or refusing to set aside an execution merely voidable.¹⁸

¹ *Selden v. Del. and Hud. Canal Co.*, 29 N. Y. 634; *Bedell v. Chase*, 34 Id. 386; *Shuttleworth v. Winter*, 55 Id. 624; *White v. Harvey*, 23 Ind. 55.

² *Pendegast v. Knox*, 32 Cal. 73; *Quivey v. Gambert*, Id. 304.

³ *Ketchum v. Crippen*, 31 Cal. 365; *Genella v. Relyea*, 32 Id. 159; *Pendegast v. Knox*, Id. 73; *Quivey v. Gambert*, Id. 304; but see *Macy v. Davila*, 48 Id. 646.

⁴ *Genella v. Relyea*, 32 Cal. 159.

⁵ *Lettingwell v. Griffing*, 29 Cal. 912.

⁶ *Lea v. Kelly*, 15 Pet. 213.

⁷ *Adams v. Woods*, 21 Cal. 165.

⁸ *Siney v. N. Y. Consol. Stage Co.*, 23 How. Pr. 481; *Janeway v. Green*, 16 Abb. Pr. 215; *Stebbins v. Savage*, 4 West Coast Rep. 477.

⁹ *Petition of Reeve*, 34 N. Y. 359.

¹⁰ *Welsh v. Darragh*, 52 N. Y. 590; *Kain v. Delano*, 11 Abb. Pr., N. S., 29.

¹¹ *Baker v. Baker*, 10 Cal. 527.

¹² *Forrest v. Forrest*, 25 N. Y. 501.

¹³ *Peck v. Courtis*, 31 Cal. 207.

¹⁴ *Hastings v. Cunningham*, 35 Cal. 553.

¹⁵ *Peralta v. Castro*, 15 Cal. 511; *Fisher v. Hepburn*, 48 N. Y. 41; *White v. Coulter*, 59 Id. 629; *Maples v. Geller*, 1 Nev. 233; *Fort v. Bard*, 1 Comst. 43; *Fasset v. Tallmadge*, 15 Abb. Pr. 205.

¹⁶ *Jones v. Derby*, 16 N. Y. 242; *Sherman v. Felt*, 2 Comst. 186; *Ingersoll v. Bostwick*, 22 N. Y. 425; *Lake Ontario, Auburn and N. Y. R. R. Co. v. Marvin*, 18 Id. 585; *McCormick v. Pickering*, 4 Comst. 276; *Cathin v. Billings*, 16 N. Y. 622; *Pendleton v. Weed*, 17 Id. 72.

¹⁷ *Belknap v. Waters*, 1 Kern. 477.

¹⁸ *Bank of Genesee v. Spencer*, 18 N. Y. 150.

§ 4985. **Void Order.**—It is not necessary to appeal from a void order which can have no operation or effect.¹

§ 4986. **Time in Which to Appeal.**—An appeal may be taken: 1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, can not be reviewed on an appeal from the judgment unless the appeal is taken in sixty days after the rendition of the judgment.² The one year commences to run from the time the judgment is rendered by the court, and not from the time it is entered in the judgment-book by the clerk;³ from the time it is announced by the court and entered in the minutes.⁴ The right of appeal depends upon the rendition, not the entry of judgment.⁵ The modification of a judgment made as the result of a motion for new trial is in effect the rendition of a new judgment, and a party thereto may appeal at any time within one year thereafter from the judgment.⁶ The pendency of an appeal from an order denying a motion for new trial does not, however, prolong the time for appealing from the judgment.⁷

The supreme court can not enlarge the time fixed by statute.⁸ In *Humphrey v. Chamberlain*, 1 Kern. 274, it is decided that that power can not be exercised directly or indirectly, either by amendment or otherwise, and that a stay of proceedings does not extend time for appeal.⁹ It appears that in New York notice of the order should in all cases be given before the time for appeal commences to run.¹⁰ On appeal from the judgment, the time runs from the filing of the judgment roll.¹¹ Such notice can not be given by anticipation, nor till judgment has been perfected by filing the judgment roll, or by entry or filing of the order in a special proceeding or after judgment rendered.¹²

¹ *Killip v. Empire Mill Co.*, 2 Nev. 34; *Kamp v. Kamp*, 59 N. Y. 212.

² Cal. Code C. P., sec. 939; *Waggenheim v. Hook*, 25 Cal. 216; *Gray v. Palmer*, 28 Id. 416; *Halleck v. Jaudin*, 34 Id. 167; *Bates v. Gage*, 49 Id. 126.

³ *Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Id. 207; *Genella v. Relyea*, 32 Id. 159; *Hall v. Beggs*, 17 La. Ann. 238.

⁴ *Wetherbee v. Dunn*, 36 Cal. 249; *Webster v. Cook*, 38 Id. 424; *McCourtney v. Fortune*, 42 Id. 387.

⁵ Cal. St. Pel. Co. v. *Patterson*, 1 Nev. 151.

⁶ *Mann v. Haley*, 45 Cal. 64.

⁷ *Bornheimer v. Baldwin*, 42 Cal. 27.

⁸ See Cal. Code C. P., sec. 1054; *Roush v. Van Hagen*, 17 Cal. 122; *Bay v. Van Rensselaer*, 1 Paige, 423; *Jackson v. Wiseburn*, 5 Wend. 136; *Dooling v. Moore*, 20 Cal. 142; *Gimmy v. Doane*, 22 Id. 635; *Gray v. Palmer*, 28 Id. 416; *Peck v. Courtis*, 31 Id. 207; *Genella v. Relyea*, 32 Id. 159; *Wait v. Van Allen*, 22 N. Y. 319.

⁹ *Gallt v. Finch*, 24 How. Pr. 193; *Morris v. Morange*, 26 Id. 247; *Salls v. Butler*, 27 Id. 133.

¹⁰ Code 1877, sec. 1325.

¹¹ Id.

¹² *Fry v. Bennett*, 16 How. Pr. 385.

An appeal must be taken: 2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment.¹ So from a judgment of a county court, rendered on appeal from a justice's court,² in cases of law. But it may be taken on the same day that judgment is entered.³ An appeal perfected on the same day of the filing of the judgment roll, but before the hour when the roll was filed, is nevertheless regular. The law does not regard fractions of a day, except to prevent injustice.⁴ But where any steps have been taken in good faith, the court has power under the statute to allow an amendment *nunc pro tunc* to supply the defect.⁵ After appealing from a judgment alone, a party may appeal from an order refusing a new trial within the statute time.⁶ But if appeal be taken in the same notice from both the final judgment and the order refusing a new trial, after sixty days from the entry of the order, the appeal from the order will be dismissed.⁷ A party neglected to appeal from an order vacating a judgment in his favor, but nearly a year after it was made moved to set it aside, and appealed from the order denying that motion: it was held that the appeal would not lie, as it would be a palpable evasion of the statute limiting the time for appeals from orders.⁸ A motion to set aside a judgment for irregularity does not suspend the time for appealing.⁹

An appeal may be taken: 3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk.¹⁰ So for refusing a new trial.¹¹ So also for refusing to vacate an award on certain grounds specified in the

¹ Cal. Code C. P., sec. 939.

² Dooling v. Moore, 20 Cal. 141.

³ Blydenburg v. Cotheal, 5 How. Pr. 200; Jones v. Porter, 6 Id. 286.

⁴ Clute v. Clute, 3 Denio, 283; Blydenburg v. Cotheal, 4 N. Y. 418.

⁵ Fry v. Bennett, 7 Abb. Pr. 352; Haase v. N. Y. Cent. R. R. Co., 14 How. Pr. 430; Sherman v. Wells, Id. 522.

⁶ Marzion v. Pioche, 8 Cal. 522;

Carpentier v. Williamson, 25 Id. 154.

⁷ Lower v. Knox, 10 Cal. 480.

⁸ Von Steemoyck v. Miller, 18 Wis. 320.

⁹ Renouil v. Harris, 2 Sandf. 641; S. C., 2 Code Rep. 71.

¹⁰ Cal. Code C. P., sec. 939, subd. 3.

¹¹ Brown v. Tolles, 7 Cal. 398; Towdy v. Ellis, 22 Id. 651; Waggenheim v. Hook, 35 Id. 216.

motion,¹ after the motion is made and entered in the minutes of the court.²

§ 4987. **Who may Appeal.**—Any party aggrieved may appeal in the cases prescribed in the title on appeals.³ The party appealing is known as the appellant, and the adverse party as the respondent.⁴ “By any party” is to be understood any person who is a party to the action.⁵ Nor can a party appeal unless he is aggrieved by the decision—that is, if he has no interest prejudiced thereby.⁶ A party who recovered judgment and assigned it before the commencement of an action to enjoin the collection of the same can not be heard.⁷ One who is not a party to the record can not appeal from an order granting a writ of assistance, but he may move to vacate the writ, and thus get on the record, and if his motion is denied, can appeal from the order denying it.⁸ If in a suit against a party alleged to be the owner of real estate, and against the real estate, to recover delinquent taxes, judgment is rendered in favor of such party, and against the real estate, he has no ground for appeal, his answer having averred that he did not own the real estate at the time it was assessed.⁹ As to who is the party aggrieved, the test is found in the question, “Would the party have had the thing if the erroneous judgment had not been given?”—if yea, then he is the party aggrieved.¹⁰ Every party whose interest in the subject-matter of the appeal is adverse, or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an “adverse party.”¹¹ A subsequent incumbrancer can not object to a judgment of foreclosure rendered against the mortgagor and himself, unless he shows that he will sustain injury from it.¹²

§ 4988. **Joint Appeal.**—All parties pleading jointly may join in appeal from decision on their pleading, though review is sought on a point available to one only.¹³ Less than all the defendants in a joint decree can not appeal without a summons and severance in the court below.¹⁴ From the interlocutory

¹ Fairchild v. Daten, 38 Cal. 286.

² Peck v. Vandenberg, 30 Cal. 11; Hihn v. Peck, Id. 280; Peck v. Courtis, 31 Id. 207.

³ Cal. Code C. P., sec. 938.

⁴ Id.

⁵ Senter v. De Bernal, 38 Cal. 640.

⁶ Id.; Foster v. Prince, 8 Abb. Pr. 407; Idley v. Bowen, 11 Wend. 227; Reid v. Vanderheyden, 5 Cow. 719; Kelly v. Israel, 11 Paige, 147; Hughes v. Stickney, 13 Wend. 280; Fairbanks v. Corlies, 3 E. D. Smith, 582; People

v. Wilson, 36 Cal. 127; Calderwood v. Brooks, 28 Id. 153.

⁷ Hobbs v. Duff, 43 Cal. 486.

⁸ People v. Grant, 45 Cal. 97.

⁹ People v. Wilson, 26 Cal. 127.

¹⁰ Adams v. Woods, 8 Cal. 306.

¹¹ Senter v. Bernal, 38 Cal. 640; Ely v. Frisbie, 17 Id. 250; Cotes v. Carroll, 28 How. Pr. 436.

¹² Mann v. Thayer, 18 Wis. 479.

¹³ Bank of Cooperstown v. Corlies, 1 Abb. Pr., N. S., 412.

¹⁴ Mussina v. Cavoza, 20 How. U. S. 280; Smith v. Clark, 12 Id. 21.

judgment upon such issue appeals may be taken by the party aggrieved, without making any persons parties to the appeal except such as were parties to the issue; but no appeal from the whole of the final judgment can be made effectual unless all of the parties to it are made parties to the appeal, either as appellants or respondents; for such a judgment can not be reversed without affecting the interest of all who are parties to it.¹

§ 4989. **Parties to the Record.**—No persons but those who are parties to the record can be permitted to be heard on an appeal,² except a purchaser at a judicial sale.³ A subsequent lien-holder may appeal from a direction in a foreclosure decree ordering the sale of mortgaged property for gold coin only.⁴ A defendant who neither answered nor appeared at any stage of the proceedings, for the purpose of contesting any step taken against him, can not appeal.⁵ Where some of several defendants make default and others answer, the defaulting defendants may appeal.⁶ A party in whose favor a decision is made, if injured thereby, may appeal therefrom.⁷ Third persons not interested in the suit should not be made parties on appeal.⁸ That the appellant has no interest in the decree from which he appeals can not be allowed to defeat the appeal.⁹

§ 4990. **Right of Appeal.**—The fact that a decree sought to be appealed from has been executed does not deprive the party of his right of appeal.¹⁰ Notice of entry of judgment, served before costs are finally adjusted, does not have the effect to limit the right of appeal.¹¹ The right of appeal must be governed by the laws in force at the time the appeal is taken.¹² The fact that parties to an action were citizens of different states does not authorize an appeal to the supreme court of the United States after decision by the supreme court of the state.¹³ Residence out of the state for several years is no ground for denying the right to appeal.¹⁴ Counsel opposing a motion to dismiss

¹ Senter v. Bernal, 38 Cal. 640.

² Id.; Harrison v. Nixon, 9 Pet. 483; Fish v. Johnson, 16 La. Ann. 29; In re Bristol, 16 Abb. Pr. 397; E. B. v. E. C. B., 28 Barb. 299.

³ Delaplaine v. Lawrence, 10 Paige, 602; Bailey v. Maule, 7 Cl. & Fin. 121; Mortimer v. Nash, 17 Abb. Pr. 229.

⁴ Miller v. Cherry, 2 Nev. 165.

⁵ Sands v. Hildreth, 12 Johns. 493; Colden v. Knickerbacker, 2 Cow. 31; Kane v. Whittick, 8 Wend. 219; Murphy v. American Life Ins. and Trust Co., 25 Id. 249.

⁶ Gimmy v. Doane, 22 Cal. 635.

⁷ Parker v. Newland, 1 Hill, 87.

⁸ Patten v. Powell, 16 La. Ann. 128. So in equity: Thompson v. Cox, 8 Jones L. 311.

⁹ Ricketson v. Compton, 23 Cal. 636.

¹⁰ Peer v. Cookerow, 1 McCarter, 361.

¹¹ Champion v. Plymouth Society, 42 Barb. 441.

¹² Hamilton v. Kneeland, 1 Nev. 60.

¹³ Id.

¹⁴ Ricketson v. Compton, 23 Cal. 637.

an action for want of prosecution, by stating that sooner than comply with the order to amend previously made, they would allow the complaint to be dismissed, and present the case on appeal, do not thereby waive the right to appeal.¹ The voluntary acceptance of costs imposed as a condition to granting a motion for new trial is not a waiver of the right to an appeal.² Where all the defendants will not join in an appeal, the appellant must summon the others and sever from them.³ The maker of a promissory note can bring an appeal from a judgment against himself and indorser jointly.⁴ A married woman, assisted and authorized by her husband in bringing the suit, must join him on the appeal.⁵

§ 4991. **Separate Appeal.**—Any one of several parties, even upon the same side, may appeal without the concurrence of his co-parties;⁶ or he may appeal for them all, but can not afterwards withdraw his appeal as to his co-defendants.⁷ In cases of maritime tort against two respondents, if they do not assume a joint defense, each may appeal separate from the other.⁸ Where a judgment is not appealed from by one party, an error in favor of the other can not be corrected.⁹

§ 4992. **Substituted Party.**—Upon the death or disability of a party pending an appeal, his representative shall be substituted in the suit, by suggestion in writing to the court on the part of such representative, or of any party on the record.¹⁰ The death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision, or departing from the ordinary procedure, except as to the entry of judgment, which should be of a day anterior to the appellant's death.¹¹ The rule is different if the death occurs previous to argument.¹² But where the appellate court, not aware of the appellant's death, rendered judgment of affirmance, upon subsequent suggestion this judgment will be vacated and a judgment of affirmance rendered as of a day previous to the death, *nunc*

¹ *Lahens v. Fielden*, 15 Abb. Pr. 177.

² *Tyson v. Wells*, 1 Cal. 378; *Champion v. Plymouth Society*, 42 Barb. 441.

³ *Perry v. Block*, 1 Mo. 484.

⁴ *Morgner v. Birkhead*, 34 Mo. 214.

⁵ *Reese v. Conyers*, 16 La. Ann. 39.

⁶ *Mattison v. Jones*, 9 How. Pr. 152; *Giraud v. Beach*, 4 E. D. Smith, 27; overruling *Farrell v. Calkins*, 10

Barb. 348; see also *Peer v. Cookerow*, 1 McCarter, 361.

⁷ *Bonner v. Campbell*, 48 Pa. St. 286.

⁸ *Thomas v. Lane*, 2 Sumn. 1. So in equity: *Forgay v. Conrad*, 6 How. U. S. 201.

⁹ *Delassus v. Poston*, 19 Mo. 425.

¹⁰ Rule 14, Sup. Ct. of Cal.; *Beach v. Gregory*, 2 Abb. Pr. 203; *Miller v. Gunn*, 7 How. Pr. 159; *Hastings v. McKinley*, 8 Id. 175.

¹¹ *Black v. Shaw*, 20 Cal. 68.

¹² *Id.*

pro tunc.¹ The death of a party before appeal taken may be shown in the supreme court by affidavit. The suggestion may be made in any court and at any stage of the proceedings.² The bankruptcy of an appellant, though adjudicated before the appeal, will not prevent its prosecution in his name, nor can the respondents object thereto. The appeal may be prosecuted in the name of the bankrupt or in that of his assignee.³ A substitution, on the ground of transfer of interest, must be set in motion by the plaintiff or his vendee.⁴

§ 4993. **Appeals, how Taken.**—There is no distinction as to the mode of taking and perfecting appeals, or as to the effect of them, between cases at law and cases in equity.⁵ Three things are necessary to the taking and perfecting an appeal: 1. Filing notice; 2. Service of the same; 3. Filing the undertaking—all within the times limited by statute.⁶ The period allowed the respondent to except to the sufficiency of the sureties can not be abridged by error or negligence of the appellant.⁷ It is always within the power of the court to extend the time fixed by law for filing papers in a cause, when the ends of justice would seem to demand it.⁸ But this does not apply to notices and undertakings on appeal.⁹ In all cases where an appeal is given by statute, the remedy is exclusive, and must be pursued.¹⁰ A remedy can not be extended beyond the provisions of the statute which gives it, and if the act does not give an appeal, none lies.¹¹ If the act conferring the jurisdiction expires, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the act.¹² An appeal may be brought by the state or the people thereof, or any officer thereof, or any county, city, or town, by filing and serving notice of appeal as above, without the filing of a bond or the payment of costs.¹³ The court below may, in its discretion, dispense with or limit the security required by the code on appeal, when the appellant is an executor, administrator, trustee, or other person acting in another's right.¹⁴ A

¹ Black v. Shaw, 20 Cal. 68; Saving and Loan Society v. Gibb, 21 Id. 609.

² Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Id. 96; see also McCreery v. Everding, 44 Id. 284.

³ O'Neil v. Dougherty, 46 Cal. 575.

⁴ Moss v. Shear, 30 Cal. 467; Hestres v. Brennan, 37 Id. 388.

⁵ Lyons v. Lyons, 18 Cal. 448. The rule as laid down in Walker v. Sedgwick, 5 Id. 192, being changed.

⁶ Hastings v. Halleck, 10 Cal. 31.

⁷ Id.

⁸ Wood v. Forbes, 5 Cal. 62.

⁹ Cal. Code C. P., sec. 1054.

¹⁰ Haight v. Gay, 8 Cal. 297.

¹¹ United States v. Nourse, 6 Pet. 470.

¹² Butler v. Palmer, 1 Hill, 328; Surtees v. Ellison, 9 Barn. & Cress. 750; 3 Burr. 1456; Key v. Goodwin, 4 Moo. & P. 341; McNulty v. Batty, 10 How. U. S. 72.

¹³ See Cal. Code C. P., sec. 1058.

¹⁴ Cal. Code C. P., sec. 946.

party can not appeal a second time from the same judgment, the first appeal having been dismissed.¹ The rule is otherwise in California. Where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law.²

§ 4994. **Perfecting Appeals.**—An appeal is perfected when a proper undertaking, with an affidavit of the sureties, has been executed, and notice of appeal served on the adverse party and the clerk, and from that time proceedings are stayed.³ Until an appeal is taken, there is nothing to give effect to an undertaking.⁴ Perfecting an appeal does not release the lien acquired by docketing the judgment,⁵ unless the enforcement of the judgment be stayed by a proper bond.⁶

§ 4995. **Effect of Appeal.**—It is also provided by statute that when the appeal is perfected, as prescribed in the preceding sections, it stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from.⁷ And such is the effect in all cases not otherwise specially provided for. It applies to an order granting a new trial;⁸ or upon an order granting an injunction.⁹ But it will not dissolve or suspend an injunction.¹⁰ The exceptions to the general rule in regard to stay of proceedings are, when the judgment or order appealed from directs the sale of perishable property, or where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, and also where the order grants or refuses to grant a change of the place of trial of an action.¹¹ It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted.¹² The taking an appeal does not operate to discharge an attachment.¹³ In Cali-

¹ Brill v. Meek, 20 Mo. 358.

² Martinez v. Gallardo, 5 Cal. 155; see Dooling v. Moore, 19 Id. 81; Gordon v. Wansey, Id. 82.

³ Ford v. Thompson, 19 Cal. 118; Pierson v. McCahill, 23 Id. 250; Thompson v. Blanchard, 2 N. Y. 561.

⁴ Buckholder v. Byers, 10 Cal. 481.

⁵ Low v. Adams, 6 Cal. 277.

⁶ Cal. Code C. P., sec. 671.

⁷ Cal. Code C. P., sec. 946.

⁸ Ford v. Thompson, 19 Cal. 118.

⁹ Hoyt v. Gelston, 13 Johns. 139;

Genni v. Chadsey, 12 Abb. Pr. 69; Howe v. Leaving, 6 Bosw. 684; Wood v. Dwight, 7 Johns. Ch. 295; Hart v. Masons of Albany, 3 Paige Ch. 381.

¹⁰ Merced Mining Co. v. Fremont, 7 Cal. 130; Hicks v. Michael, 15 Id. 109.

¹¹ Cal. Code C. P., sec. 949.

¹² Marbury v. Madison, 1 Cranch, 49.

¹³ Spencer v. Rogers Locomotive Works, 13 Abb. Pr. 180.

for California an appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless within five days after the entry of the order appealed from, such appeal be perfected.¹ In New York an appeal with security does not discharge a previous levy.² But the court may in its discretion discharge a levy upon motion.³ In California a bond staying execution releases a levy.⁴ An appeal from a decree for an injunction, duly perfected, will suspend proceedings to punish its violation.⁵ Where the decree merely directs certain payments to be made, it is sufficient as a stay of proceedings.⁶ The stay of proceedings derived from taking an appeal does not prevent a filing of the transcript previously procured.⁷ It does not prevent the party who by the judgment appealed from was declared to be entitled to the office from proceeding to compel the delivery of books and papers to him.⁸

§ 4996. **Notice of Appeal.**

Form No. 1158.

[TITLE.]

Please take notice that the [plaintiff] in the above-entitled action hereby appeals to the supreme court of this state, from the [judgment] therein made and entered, in the said superior court, on the day of, in favor of the [defendant] in said action, and against said [plaintiff], and from the whole thereof.

[DATE.]

[SIGNATURE.]

To the clerk of said superior court, and to E. D., attorney for C. G.

§ 4997. **Amendment of Notice.**—A notice, when served, is amendable in respect of defects which do not destroy its substantial character.⁹ And mere formal errors may be disregarded.¹⁰ But a notice can not be amended so as to include an order or

¹ Cal. Code C. P., sec. 946.

² Stricker v. Wakeman, 13 Abb. Pr. 85; Smith v. Allen, 2 E. D. Smith, 239.

³ Code 1877, sec. 1311; Stricker v. Wakeman, 13 Abb. Pr. 85.

⁴ Code C. P., sec. 946. Prior to 1874 it was otherwise: See Ewing v. Jacobs, 49 Cal. 72.

⁵ Howe v. Searing, 6 Bosw. 684. As to the effect of appeal from an order of reference, see Smith v. Pollock, 2 Cal. 92. From an order con-

firning a survey of a Mexican grant: Thornton v. Mahoney, 24 Id. 569.

But as to its effect as a stay generally, see Tiers v. Carnahan, 3 Abb. Pr. 69.

⁶ Curtis v. Leavitt, 10 How. Pr. 481.

⁷ Bulkeley v. Keteltas, 3 Sandf. 740.

⁸ Welch v. Cook, 7 How. Pr. 282.

⁹ Fry v. Bennett, 16 How. Pr. 385.

¹⁰ People v. Tarbell, 17 How. Pr. 120; Sherman v. Wells, 14 Id. 522, 526.

judgment not in the original notice.¹ An oral notice can not be amended.² When there is a failure to give in good faith notice of appeal, no amendment can be allowed.³

§ 4998. **Filing Notice.**—In California a notice of appeal given before July 1, 1874, was required to be filed on the same day it was served.⁴ The amendments to section 940 of the code of civil procedure, if it changed the rule in this respect, did not take effect until July 1, 1874.⁵ Formerly the filing of the notice was required to precede the service of it, or be contemporaneous with it, but the order of service is now immaterial.⁶ Where a notice of appeal is filed one day before expiration of time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after filing notice of appeal, it was held that the appeal was taken in time.⁷ Where a notice of appeal to the circuit court from an appraisal of lands was informally served, and afterwards filed with the clerk of the railroad company, and he was made acquainted with its contents, it was not error for the court to refuse to dismiss the appeal on that ground.⁸

§ 4999. **Filing and Serving Notice.**—An appeal is made by filing and serving the notice. Both requisites must exist to complete the appeal,⁹ and must be within the time prescribed by law¹⁰ to give jurisdiction to the appellate court.¹¹ The omission of serving the notice of appeal on the clerk within the time limited therefor can not be rectified.¹² The fact that the party to be served is absent from the state does not dispense with service.¹³ Where notice of appeal and undertaking were filed in the clerk's office on the same day, and on the next day a copy of the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties, it was held that respondent was not injured by failure to serve copy of notice on the day the undertaking was filed.¹⁴

§ 5000. **Proof of Service.**—Service of notice may be proved

¹ Fry v. Bennett, 16 How. Pr. 385; Bryant v. Bryant, 4 Abb. Pr., N. S., 138; and see Whitby v. Leeds, 27 How. Pr. 378.

² People v. Eldridge, 7 How. Pr. 108.

³ People v. Eldridge, 7 How. Pr. 108; Cotes v. Carroll, 28 Id. 436.

⁴ Dinan v. Stewart, 48 Cal. 567.

⁵ Id.

⁶ See Code C. P., sec. 940.

⁷ Peran v. Monroe, 1 Nev. 484.

⁸ Black v. Chicago R. R. Co., 18 Wis. 208.

⁹ Whippley v. Mills, 9 Cal. 641; Lambert v. Moore, 1 Nev. 344; People v. Eldridge, 7 How. Pr. 108.

¹⁰ Hastings v. Halleck, 10 Cal. 31.

¹¹ Bonds v. Hickman, 20 Cal. 460; Bell v. Holford, 1 Duer, 58.

¹² Morris v. Morange, 26 How. Pr. 247; Elsworth v. Fulton, 24 Id. 20; People v. Eldridge, 7 Id. 108.

¹³ Eckstein v. Calderwood, 46 Cal. 650.

¹⁴ Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

by affidavit of a third person.¹ Where such affidavits only disclose that the affiant, who was a third person, mailed a copy of the notice at Santa Cruz, directed to the respondent's attorneys at San Francisco, but did not state that the attorney for whom he acted resided at Santa Cruz, it was held that the affidavit was defective.² Affidavit of service on respondent's attorney, if it does not show a personal service, must state that the notice was left in his office with his clerk, or with a person having charge thereof, or that no person was in the office, and that notice was left there in a conspicuous place between the hours of eight in the morning and six o'clock in the afternoon.³ Where notice has been properly served by personal or substituted service, appellant may, on motion to dismiss appeal, move for leave to supply omitted proof of service; upon leave being granted, he may file in the court below the requisite affidavit or official certificate of service, and a certified copy thereof may be annexed to the record in appellate court.⁴ An acknowledgment of service indorsed on the notice as follows: Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863, is no waiver of an objection that service upon the day mentioned is too late.⁵

§ 5001. **Service, how and when Made.**—Notice of appeal taken by the people, in a criminal case, must be served on the defendant personally.⁶ It must affirmatively appear in the record that a copy of the notice has been served on the adverse party or his attorney.⁷ Service upon the opposite attorney is always sufficient,⁸ and may be made by mail with its usual incidents, where otherwise admissible.⁹ Service of papers upon the clerk of the court by mail is effective only from the date of his actually receiving them.¹⁰ Where a board of supervisors appeals, the notice need not be given by the president of the board or district attorney; notice by the attorney of record is sufficient.¹¹ A copy of the notice of appeal filed must be served on the opposite party, before or at the time of filing the undertaking.¹² It can not be filed and served after the undertaking

¹ Moore v. Bease, 35 Cal. 186.

² Id.

³ Doll v. Smith, 32 Cal. 475.

⁴ Moore v. Bease, 35 Cal. 186.

⁵ Towdy v. Ellis, 22 Cal. 651.

⁶ People v. Wallace, 23 Cal. 94.

⁷ Cal. Code C. P., sec. 940; Senter v. Bernal, 38 Cal. 637; Franklin v. Reiner, 8 Id. 340; Hildreth v. Gwin-
der, 10 Id. 490.

⁸ Coulter v. Stark, 7 Cal. 244.

⁹ Dorlan v. Lewis, 7 How. Pr. 132;
Crittenden v. Adams, 5 Id. 310.

¹⁰ Morris v. Morange, 26 How. Pr.
247; S. C., 17 Abb. Pr. 86.

¹¹ Damrell v. Board of Supervisors
of San Joaquin Co., 40 Cal. 157.

¹² Buffeudeau v. Edmondson, 24 Cal.
94.

is filed.¹ Where the notice has been filed and served after the undertaking is filed, a second appeal may be taken, if in time.²

§ 5002. **Sufficiency of Notice.**—A notice of appeal from a judgment and from all orders made in the cause is only an appeal from a judgment. It does not sufficiently describe any order.³ Even when an appeal is taken from a judgment, orders necessarily affecting it must also be appealed from in form.⁴ A notice which states that the appeal is taken “from all orders of the district court made and entered in the action,” is insufficient.⁵ A notice appealing from all orders made by a probate court in the case, on a certain day, is sufficient.⁶ A notice of intention to appeal all parts of the principal case proper is a sufficient notice of intention to appeal the whole case.⁷ In forcible entry and detainer, a notice is not invalidated because it contains a clause that the “appeal is taken on questions of law alone.”⁸ If the record shows that the notice was not served in time, no appeal is pending, and a motion to dismiss will be denied.⁹ If the notice is signed by an attorney of the court, the presumption is that he had authority to take such action.¹⁰

§ 5003. **Stipulations, Effect of.**—A stipulation that no execution shall issue until the determination of the appeal is not a waiver of an objection that the notice of appeal was not filed in season.¹¹ If the attorneys of the parties stipulate in the transcript that notice was filed in the court below and served, the supreme court can not receive evidence contradicting the stipulation.¹² The court below, upon proper application, can relieve a party from a mistake of fact in such cases, but the supreme court can not.¹³ Where the object of a notice of appeal is accomplished, it is immaterial whether the notice of appeal is given or not.¹⁴ Where both parties appear, no notice whatever is necessary to be shown.¹⁵ An admission of due service waives all objections, even that of notice not having been given in due time.¹⁶

§ 5004. **What to Contain.**—The notice shall contain a statement of the judgment or order, or the specific part thereof,

¹ Dooling v. Moore, 19 Cal. 81; Carpentier v. Williamson, 24 Id. 609.

² Dooling v. Moore, *supra*; Columbet v. Pacheco, 46 Cal. 650.

³ Gates v. Walker, 35 Cal. 289.

⁴ Fry v. Bennett, 16 How. Pr. 385; Marqueart v. Lafarge, 5 Duer, 559.

⁵ Genella v. Relyea, 32 Cal. 159.

⁶ Estate of Pacheco, 29 Cal. 224.

⁷ Branch v. Dick, 14 Ohio St. 551.

⁸ Zoller v. McDonald, 23 Cal. 136.

⁹ Harlan v. Pratt, 50 Cal. 94.

¹⁰ Ricketson v. Compton, 23 Cal. 636.

¹¹ Moulton v. Ellmaker, 30 Cal. 527.

¹² Bonds v. Hickman, 29 Cal. 460.

¹³ Id.

¹⁴ McLeran v. Shartzer, 5 Cal. 70.

¹⁵ Id.; doubted in Killip v. Empire Mill etc. Co., 2 Nev. 43.

¹⁶ Struver v. Ocean Ins. Co., 2 Hilt. 475.

appealed from.¹ It need not state the grounds of appeal, nor the objections raised;² though it has been said it would be better practice to do so.³ If there is enough in the notice to show that the judgment or order contained in the transcript is the same intended to be appealed from, it will not be dismissed, although it may contain mistakes as to the dates of the order or judgment.⁴ A notice stating that defendant appealed from the whole judgment is sufficient notice within the statute.⁵ The place for assignment of error is in the statement, and not in the notice of appeal.⁶

§ 5005. **Undertaking for Costs and Damages on Appeal.**

Form No. 1159.

[TITLE.]

Whereas the in the above-entitled action is about to appeal to the supreme court of the state of, from a entered against in said action, in the said superior court, in favor of the in said action, on the day of, 18.., for dollars damages, and costs of suit, and

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned,, of the county of, and, of, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

[DATE.]

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

§ 5006. **Undertaking on Appeal Staying Execution.**

Form No. 1160.

[TITLE.]

Whereas the in the above-entitled action appeals to the supreme court of the state of, from a made and entered against in said action in the said superior court in favor of the in said action, on the day of, 18.., for dollars damages, and dollars costs of suit, and

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, of the county of, and, of, do hereby jointly and

¹ Cal. Code C. P., sec. 940.

⁵ Price v. Van Caneghan, 5 Cal. 124;

² Wilson v. Allen, 3 How. Pr. 359.

Wilson v. Allen, 3 How. Pr. 372;

³ Smith v. Grant, 17 How. Pr. 381.

People v. Boylston, 17 Id. 120.

⁴ Flateau v. Lubeck, 24 Cal. 364.

⁶ Burnett v. Pacheco, 27 Cal. 409.

severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant desirous of staying the execution of the said so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of dollars, being double the amount named in the said, that if the said appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal; and that if the appellant.. do.. not make such payment within thirty days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of respondent.. in favor, against the said sureties for such amount, together with the interest that may be due thereon, and the damages and costs that may be awarded against the appellant.. upon the appeal herein.

[DATE.] .

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

§ 5007. Undertaking on Appeal in Ejectment.

Form No. 1161.

[TITLE.]

Whereas, the in the above-entitled action, has appealed to the supreme court of the state of, from a made and entered against in the said action, in the said superior court, in favor of the in the said action, on the day of, 18..., for the recovery of the possession of certain lands and premises therein described, and dollars damages for the detention thereof, and dollars costs of suit:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned,, of the county of, and, of the, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to

which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant desirous of staying the execution of the said so appealed from, as to the said costs and damages, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of dollars (being double the amount named in the said for said costs and damages), that if the said appealed from, or any part thereof, in that respect be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

And whereas the appellant desirous of staying the execution of the said so appealed from, in so far as relates to the possession of said land and premises, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of dollars (being the amount for that purpose fixed by the judge of this court), that during the possession of such property by the appellant, will not commit, or suffer to be committed, any waste thereon, and that if the said appealed from be affirmed, or the appeal dismissed, will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the sum of dollars, so as aforesaid fixed by the judge of this court, by which the said was

[DATE.]

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

§ 5008. **Amendments.**—The omission of the words “to pay to” will not invalidate an appeal bond on appeal from a justice’s court.¹ Were it otherwise, the court should have given leave to file a new bond.² The court has power to allow an

Billings v. Roadhouse, 5 Cal. 71.
¹ Id.; see also Howard v. Harman, 5 Cal. 78; Coulter v. Stark, 7 Id. 244; Cunningham v. Hopkins, 8 Id. 34; Frankel v. Stern, 44 Id. 168. In Langley v. Warner, 3 How. Pr. 363, the undertaking was to pay all damages, but there was no agreement to pay costs, and it was held that the

appeal was not effectual for any purpose, and that the court could not amend such an undertaking without the consent of the parties to it. The contrary was held in Wilson v. Allen, Id. 369. The former decision was by the court of appeals, the latter by the supreme court.

amendment to an undertaking, as to technical facts.¹ Defects in justification may, by leave of court, be similarly obviated.² Or such defects may be supplied by allowing the filing and service of a new undertaking, *nunc pro tunc*.³ The supreme court can and will, in case of accident or mistake, allow the appellant to substitute a sufficient undertaking for a defective one, even after the five days.⁴ But where the defect in justification was of an essential and not of a technical nature, the application for amendments was denied.⁵ An undertaking can not be amended in substance, varying the liability of the sureties without their consent.⁶

§ 5009. **Amount.**—The only undertaking required to perfect an appeal is one for the payment of all costs and damages which may be awarded against the appellant, not exceeding three hundred dollars.⁷ A deposit of that sum with the clerk of the court in which the judgment or order appealed from was entered fulfills the purpose of the undertaking. But to stay execution of a judgment or order directing the payment of money, the undertaking must be in double the amount named in the judgment or order.⁸ The amount due on the judgment appealed from must be distinctly stated in the undertaking to form a ground-work for the necessary affidavit of justification.¹⁰ An undertaking on appeal is not invalidated because the sum mentioned exceeds three hundred dollars.¹¹ If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the undertaking shall be for such amount as the court, or the judge thereof, or the county judge may direct.¹² And it may be for sufficient to provide for the deterioration of the property.¹³ Where the court neglects to fix the amount of the appeal bond, appellant may give bond in a sufficient amount.¹⁴ If the judgment or order direct the execution of a conveyance or other instrument, the appeal will not operate as a stay unless the instrument is executed or de-

¹ Marvin v. Marvin, 11 Abb. Pr., N. S., 97; Beach v. Southworth, 6 Barb. 173; People v. Tarbell, 17 How. Pr. 120.

² Hees v. Suell, 8 How. Pr. 185.

³ Mills v. Thursby (No. 8), 11 How. Pr. 129; Tiers v. Carnahan, 3 Abb. Pr. 69; Kissam v. Marshall, 10 Id. 424; Sternhaus v. Schmidt, 5 Id. 66.

⁴ Rabe v. Hamilton, 18 Cal. 32; but see Shaw v. Randall, Id. 386.

⁵ N. Y. Cent. Ins. Co. v. National Protec. Ins. Co., 10 How. Pr. 344; Cushman v. Martine, 13 Id. 402.

⁶ Langley v. Warner, 1 Comst. 606; S. C., 3 How. Pr. 363; Cobb v. Lackey, 6 Duer, 649; see N. Y. Code (1877), sec. 730.

⁷ Cal. Code C.P., sec. 941.

⁸ Id.

⁹ Id., sec. 942.

¹⁰ Harris v. Bennett, 3 Code Rep. 23.

¹¹ Zoller v. McDonald, 23 Cal. 136. In re Estabrooks, 5 Cow. 27.

¹² Cal. Code C. P., sec. 943.

¹³ Read v. Potter, 11 Abb. Pr. 413.

¹⁴ Hubble v. Renick, 1 Ohio St. 171.

posited with the clerk to abide the judgment of the appellate court.¹

§ 5010. **Consideration.**—The stay of proceedings accorded by the statute to the execution of the undertaking is a sufficient consideration.² Where the undertaking is pursuant to statute, it need express no consideration on its face.³ But an undertaking not pursuant to statute, expressing no consideration, and not under seal, is void.⁴

§ 5011. **Deposit in Court.**—In all cases, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.⁵

§ 5012. **Delivery.**—The execution of the paper, delivery to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is *prima facie* as sufficient proof of delivery, if delivery is essential, as if the undertaking were sealed.⁶

§ 5013. **Exception to Sureties.**—The adverse party may except to the sufficiency of the sureties within thirty days after filing, and the opposite party has twenty days thereafter to get other sureties, or have the same justified before the judge before whom the cause was tried or before the county clerk.⁷ Where the appellant gave notice of the justification on a certain day, during certain hours of the day, respondent has till the last hour specified in which to appear and except.⁸ The objection that an undertaking to stay proceedings is insufficient may be waived.⁹ So failing to attend at the time and place of justification waives his objection, although the sureties also fail to attend.¹⁰

§ 5014. **Filing Undertaking.**—Such undertaking shall be filed, or such deposit made, with the clerk, within five days after the notice of appeal is filed;¹¹ and the court has no power to extend the time.¹² A failure to comply with the statute will be fatal.¹³ The provisions of a statute in regard to the time within which an act is to be done must not be construed as di-

¹ Cal. Code C. P., sec. 944.

² Dore v. Covey, 13 Cal. 502.

³ Thompson v. Blanchard, 3 Comst. 335; Seacord v. Morgan, 17 How. Pr. 394.

⁴ Robert v. O'Donnell, 10 Abb. Pr. 454.

⁵ Cal. Code C. P., sec. 948.

⁶ Dore v. Covey, 13 Cal. 502.

⁷ Cal. Code C. P., sec. 948.

⁸ Lower v. Knox, 10 Cal. 480.

⁹ Halsey v. Flint, 15 Abb. Pr. 368.

¹⁰ Ballard v. Ballard, 18 N. Y. 491.

¹¹ Cal. Code P. C., sec. 940; Merced Mining Co. v. Fremont, 7 Cal. 132; Lambert v. Moore, 1 Nev. 344; Peran v. Monroe, Id. 484.

¹² Elliott v. Chapman, 15 Cal. 383; affirmed in Shaw v. Randall, Id. 384.

¹³ Gordon v. Wansey, 19 Cal. 82.

rectory where a consequence is attached to a failure to comply.¹ The undertaking can not be filed before the notice of appeal is filed and served.² The time of filing the undertaking relates back to the time of filing and service of notice of appeal.³ Parties intending to take advantage of the failure to file the requisite undertaking must do so before the case is submitted.⁴

§ 5015. **Filing New Undertaking.**—Where, on appearance of parties for justification, under exception to sureties, a new undertaking is filed in the place of the old one, the appeal will not be dismissed because the undertaking was not filed within five days after the notice of appeal.⁵ No appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal.⁶ In such case, on filing new undertaking in the supreme court, approved by one of the justices, the respondent can not require the sureties on the new undertaking to justify.⁷

§ 5016. **Form.**—The undertaking may be in one instrument or several, at the option of the appellant.⁸ It is not necessary that an appeal bond conform in all respects to the form prescribed by statute.⁹ Non-compliance with the directory provisions of the statute intended for the benefit of the respondent does not vitiate the undertaking.¹⁰ A non-compliance with essentials may invalidate an undertaking.¹¹ The omission of the words “to pay to” will not invalidate the obligation; if it did, leave should be granted to file a good bond.¹² An undertaking given in the form of a penal bond, providing it substantially conform to all the conditions above imposed, is good.¹³ Where an instrument purporting to be a bond on appeal contains words of obligation, and has a scroll opposite the name of one of the two signers who contemporaneously verify the instrument as their bond, it is the bond of both.¹⁴ The names and residence of the

¹ Shaw v. Randall, 15 Cal. 384.

² Dooling v. Moore, 19 Cal. 81; Carpenter v. Williamson, 24 Id. 609.

³ Peran v. Monroe, 1 Nev. 484.

⁴ Cook v. Klink, 8 Cal. 352; Bryan v. Berry, Id. 130.

⁵ Cummins v. Scott, 23 Cal. 526.

⁶ Cal. Code C. P., sec. 954; see also Coulter v. Stark, 7 Cal. 244; Cunningham v. Hopkins, 8 Id. 34; Sternhaus v. Schmidt, 5 Abb. Pr. 66; Dean v. Hemphill, Hempst. 154.

⁷ Stevenson v. Steinberg, 32 Cal. 373.

⁸ Cal. Code C. P., sec. 947; Englund v. Lewis, 25 Cal. 355.

⁹ Foster v. Foster, 7 Paige Ch. 48.

¹⁰ Dore v. Covey, 13 Cal. 502.

¹¹ Chemung Canal Bank v. Judson, 10 How. Pr. 133.

¹² Billings v. Roadhouse, 5 Cal. 71.

¹³ Couklin v. Dutcher, 5 How. Pr. 386.

¹⁴ Canfield v. Bates, 13 Cal. 606.

sureties need not appear in the body of the paper.¹ Residence of sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions.²

§ 5017. **Form and Sufficiency.**—Where there are two orders, but the substance of one is contained in the other, so that two orders were not necessary, only one appeal and one bond are necessary.³ If an appeal be taken from two separate orders, two separate securities must be given.⁴ But where a judgment is single, only one undertaking will be requisite, though it directs the payment of different sums to different defendants.⁵ If the respondents have a distinct interest in the decree, a bond should be given to each; but if their interests be joint, one bond is sufficient.⁶ If an instrument executed and deposited with the clerk, as required by section 351 of the California code of civil procedure,⁷ be lost or destroyed pending the appeal, the appellant, if unsuccessful, will be bound to execute another.⁸ After an appeal which is a nullity, the party may, if the time has not expired, disregard such appeal and prosecute another.⁹ “That the appellant will pay all costs and damages which may be awarded against him on the appeal, and also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars,” is a sufficient undertaking under this section.¹⁰ A bond running “to the respondent, if living, and if not living, then to his executors,” is not a bond to the adverse party, and will not sustain an appeal.¹¹ An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite.¹² Where a bond was executed by a surety, and rejected by the justice, and afterwards, without the knowledge of the obligor, the name of another was interlined as an obligor, who executed the bond, it was held that it was void as to the first obligor.¹³

§ 5018. **Justification of Sureties.**—The adverse party may except to the sufficiency of the sureties at any time within thirty

¹ Dore v. Covey, 13 Cal. 502. That they are usually stated, see Beach v. Southworth, 6 Barb. 173; Blood v. Wilder, 6 How. Pr. 446.

² Dobbins v. Dollarhide, 15 Cal. 375; Dore v. Covey, 13 Id. 502.

³ Gregory v. Dodge, 3 Paige Ch. 90.

⁴ Schermerhorn v. Anderson, 1 Comst. 430.

⁵ Smith v. Lynes, 2 Comst. 569; S. C., 4 How. Pr. 209.

⁶ Thompson v. Ellsworth, 1 Barb. Ch. 624.

⁷ N. Y. Code, sec. 337.

⁸ Worrall v. Munn, 17 N. Y. 475.

⁹ Kelsey v. Campbell, 38 Barb. 238.

¹⁰ Zoller v. McDonald, 23 Cal. 136.

¹¹ Anderson v. Anderson, 20 Wend. 585.

¹² Curtis v. Richards, 9 Cal. 33; Tissot v. Darling, Id. 278.

¹³ O’Neale v. Long, 4 Cranch, 60; and see Martin v. Thomas, 24 How. U. S. 315.

days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, a county judge, or county clerk, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed.¹ The time has been held to run from the filing of the undertaking, and not from the service of copy of undertaking and notice of appeal.² Where, after notice of exception, the time for justification was extended, the failure of the sureties to justify within five days after notice of exception renders the appeal a nullity; that the statute upon this is peremptory, and the court had no power to extend the time.³ And it is error in the judge to make an order of *supersedeas* staying the execution.⁴ And where judgment is for more than three thousand dollars, several persons may act as sureties, and justify severally in the amount specified in the undertaking as that for which either becomes responsible.⁵

§ 5019. **Justification, Affidavit of.**—Every undertaking must be accompanied by the affidavits of the sureties that each of them is a resident and householder or freeholder within the state, and are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution.⁶

§ 5020. **Liability of Sureties.**—An appeal bond will be so construed as to carry out the obvious intention of the parties.⁷ In an action upon a bond or written undertaking there can be no constructive parties jointly liable with proper obligors.⁸ An appeal bond signed by a firm as sureties on appeal renders only the partner who signed the firm's name liable, unless the other partner assented.⁹ A right of action on an undertaking executed to stay a writ of restitution pending an appeal from a judgment in ejectment accrues upon the affirmance of the judgment, though the liability of the obligors may continue until the applicants deliver possession of the premises recovered.¹⁰ The liability of the sureties can not be greater than that of the

¹ Cal. Code C. P., sec. 948.

² Webster v. Stephens, 3 Abb. Pr. 227.

³ Roush v. Van Hagen, 17 Cal. 121; Lower v. Knox, 10 Id. 480; Chamberlain v. Dempsey, 13 Abb. Pr. 421; S. C., 22 How. Pr. 356; Kelsey v. Campbell, 14 Abb. Pr. 368; S. C., 38 Barb. 238.

⁴ Mokelumne Hill Co. v. Woodbury, 10 Cal. 188.

⁵ Cal. Code C. P., sec. 1057; see also Id., sec. 942.

⁶ Cal. Code C. P., sec. 1087.

⁷ Swain v. Graves, 8 Cal. 549.

⁸ Lindsey v. Flint, 4 Cal. 88.

⁹ Charman v. McLean, 1 Or. 339.

¹⁰ De Castro v. Clarke, 29 Cal. 11.

principal.¹ In New York it has been held that the undertaking only extends to the case of an affirmance of the judgment, and the sureties are not liable on the dismissal of an appeal.² But otherwise if the dismissal be from mere neglect to prosecute the appeal.³ But now sureties are liable in all cases of dismissal.⁴ Affirmance means an affirmance by any tribunal having cognizance of the cause.⁵ The sureties upon a joint undertaking are liable, if the judgment is affirmed against one.⁶

§ 5021. **Money Judgment.**—The undertaking, to operate as a stay of execution, must be in double the amount of the judgment. The conditions of the undertaking are, that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment in thirty days after filing the *remittitur* of the supreme court, judgment may be rendered against the sureties upon motion of the respondents.⁷ When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment.⁸

§ 5022. **Remedy on Defective Undertaking.**—An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties, where the undertaking was both to render the appeal effectual, and to stay execution, and the justification was sufficient for the former purpose. Respondent's remedy is by motion in the court below for leave to proceed on the judgment.⁹

§ 5023. **Setting Aside Undertaking.**—If an undertaking is defective on an appeal from judgment of sale in foreclosure, the plaintiff should move to set it aside; otherwise, if he proceed to sell the premises under the judgment, the sale must be

¹ Whitney v. Allen, 21 Cal. 233.

² Watson v. Husson, 1 Duer, 242; Drummond v. Husson, 4 Kern. 60; Mills v. Forbes (No. 12), 12 How. Pr. 446.

³ Karth v. Light, 15 Cal. 327; Chamberlain v. Reed, 16 Id. 207; Chase v. Beraud, 29 Id. 138.

⁴ See Cal. Code C. P., sec. 942.

⁵ Gardner v. Barney, 24 How. Pr.

467.

⁶ Id.

⁷ Cal. Code C. P., sec. 942.

⁸ Id.

⁹ Dobbins v. Dollarhide, 15 Cal. 374; Mokelumne Hill Co. v. Woodbury, 10 Id. 185.

vacated.¹ Where the undertaking substantially conforms with the requirements of the statute, defects will be disregarded, if not objected to by motion to set it aside.²

§ 5024. **Undertaking to Effect Stay.**—Whenever an undertaking has been duly given and perfected, it suspends all further proceedings upon the judgment appealed from, or upon the matter embraced therein; but as regards other matter, the power to proceed is not affected.³ Unless an undertaking be given, the mere execution and deposit of the instrument with the clerk will be ineffectual, and will procure no stay.⁴ When given, such an undertaking only stays future, and does not affect the validity of any past, proceedings. Thus, where given after levy, it does not operate to discharge a lien already affected, but only suspends its enforcement.⁵ Such stay is inchoate upon giving the undertaking, but defeasible in case sureties fail to justify if excepted to.⁶ When judgment directs a sale to satisfy a lien other than a mortgage lien, the undertaking need not provide for payment of any deficiency which the judgment may direct to be paid.⁷ In other cases, if there is a provision for the payment of a deficiency, the undertaking must provide for such deficiency.⁸ And if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property under the lien is not stayed;⁹ nor will, in such case, a bond for costs stay the proceedings.¹⁰

§ 5025. **Who Exempt from Undertaking.**—No bond, written undertaking, or security can be required of the state or the people thereof, or any officer thereof, or of any county, city, or town.¹¹

¹ Parfitt v. Warner, 13 Abb. Pr. 471.

² Id.

³ Curtis v. Stillwell, 32 Barb. 354; Welch v. Cook, 7 How. Pr. 282; see Trustees of Penn Yan v. Forbes, 8 Id. 285.

⁴ Waring v. Ayres, 12 Abb. Pr. 112.

⁵ In re Berry, 26 Barb. 55; Cook v. Dickerson, 1 Duer, 679; Rathbone v. Morris, 9 Abb. Pr. 213; Waring v. Ayres, 12 Id. 112; Stricker v. Wake-

man, 13 Id. 85; but see Cal. Code C. P., secs. 671, 946.

⁶ Thompson v. Blanchard, 2 Comst. 561; 4 How. Pr. 210.

⁷ Englund v. Lewis, 25 Cal. 337.

⁸ Id.

⁹ Id.; see Stafford v. Union B'k of Louisiana, 16 How. U. S. 135.

¹⁰ Orchard v. Hughes, 1 Wall. 73.

¹¹ Cal. Code C. P., sec. 1058.

CHAPTER III.

STATEMENT ON APPEAL.

§ 5026. **In General.**—To what extent the California code of civil procedure has changed the practice relating to appeals has not yet been fully adjudicated. It is believed, however, that there has been no substantial change. Under section 338 of the California practice act, the party wishing to appeal prepared a “statement,” stating therein, specifically, the errors or grounds upon which he intended to rely upon the appeal, and inserting so much of the evidence as might be necessary to explain the particular errors or grounds specified. By another section it was provided that an exception when not delivered in writing, or written down by the clerk, might be entered in the judge’s minutes and afterward settled in a statement of the case.¹ If exceptions were reduced to writing, settled and allowed by the judge during the trial and before judgment, they became part of the judgment roll without further action by the court or party; otherwise the party was allowed twenty days to prepare his statement. The code of civil procedure does not in terms provide for a statement on appeal, except where a statement has been made under a motion for new trial, in which case such statement “may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial.”² But though the code of civil procedure does not provide for a “statement” on appeal, such as was authorized by section 338 of the practice act, the same thing in substance is accomplished by a “bill of exceptions,” prepared and settled in a similar manner.³ A bill of exceptions to any decision may be presented to the court or judge for settlement at the time when the decision is made, and when settled and signed by the judge, is filed by the clerk.⁴ Such bill of exceptions becomes part of the judgment roll, which is made up by the clerk immediately after entering judgment.⁵ Where the bill of exceptions is settled after judgment, it is filed with the clerk; but there is no provision making it a part of the record or judgment roll. Such bill of exceptions, however, must be furnished to the supreme court by the appellant, if he relies upon it, together with his notice of appeal and a copy of the judgment roll.⁶ While

¹ Cal. Code C. P., sec. 189.

² Id., sec. 950.

³ See Id., sec. 650.

⁴ Id., sec. 649.

⁵ Id., sec. 670.

⁶ Id., sec. 950.

this does not make it a part of the judgment roll, and therefore not a part of the record in the court below, it becomes a part of the record on appeal from the judgment.¹ As a statement on appeal and a bill of exceptions settled perform the same office in an appeal from a judgment, differing only in name and partially in form, and the former being perhaps still admissible, the decisions under the former practice are still valuable, and in most respects applicable.²

The office of the statement is to bring into the record orders and rulings, with facts necessary to explain them, which are made in all stages of the proceedings, as well as during the progress of the trial, and not contained in the judgment roll.³ And questions not arising on the judgment roll are thus presented.⁴ But if an appeal is taken from the judgment roll alone, no statement of grounds nor errors need be assigned, nor be contained in the transcript.⁵ The case regularly settled and filed, and made part of the papers presented to the court, is indispensable.⁶ Non-appealable orders can be reviewed only by means of a statement on appeal from the final judgment.⁷ Where, on appeal from an order subsequent to final judgment objections to the consideration of certain affidavits contained in the record were not taken as required by rule 13 of the supreme court, such objections will be deemed waived; but the rule is otherwise in respect to the subject-matter of a statement on appeal contained in such record, where no statement embodying the same, duly settled, certified, or agreed to, as required by law, existed in the court below.⁸ The allegation of the omission of the judge to settle a statement which was submitted to him can not be taken as a substitute for a statement.⁹ To review the final decision of a referee, a case must be made containing the facts found by the referee, his conclusions of law thereon, and the exceptions of the party who appeals.¹⁰ A case should present with legal and logical precision the questions which are to be examined, and should contain nothing else.¹¹ The questions of law and fact raised must be distinctly set forth,

¹ *Caldwell v. Parks*, 47 Cal. 640; *Berry v. S. F. & N. P. R. Co.*, 47 Id. 643.

² See *Wetherbee v. Carroll*, 33 Cal. 549; Cal. Code C. P., sec. 650.

³ *Abbott v. Douglass*, 28 Cal. 299; *De Johnson v. Sepulbeda*, 5 Id. 149; *Harper v. Minor*, 27 Id. 107.

⁴ *Wetherbee v. Carroll*, 33 Cal. 549.

⁵ *Solomon v. Reese*, 34 Cal. 28; *Jones v. City of Petaluma*, 30 Id. 230.

⁶ *Conolly v. Conolly*, 16 How. Pr. 224; *Broward v. State*, 9 Fla. 422.

⁷ *Gates v. Walker*, 35 Cal. 289.

⁸ *Wetherbee v. Carroll*, 33 Cal. 549; *Rogers v. Parish*, 35 Id. 127.

⁹ *Hoadley v. Crow*, 22 Cal. 265.

¹⁰ *Johnson v. Whitlock*, 3 Kern. 344; *Westcott v. Thompson*, 16 N. Y. 613.

¹¹ *Bissel v. Hamlin*, 20 N. Y. 519.

accompanied with only so much evidence as may be necessary to show their pertinency and materiality; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause which was necessary to be stated in order to explain the points specified, and that it would not have presented a different case, in respect to the specified points, had it contained also the omitted evidence.¹

Where a judgment on trial by the court comes up for review without any finding of facts, nothing can be presumed against the correctness of the judge's decision.² The appellate court can not look beyond the findings of fact contained in the case, in order to draw any inference of fact bearing on the appeal.³ It is essential that the finding upon the facts be explicit, and cover all the material facts in the case.⁴ In order to review the judgment after trial by the court, or the decision of a referee, a statement of the facts found by the judge, and his conclusions of law, is imperatively required. The party who prepares the case should insert the statement, which will be subject to amendment and settlement by the judge. If a conclusion of fact is to be reviewed, then the evidence bearing upon that conclusion must be inserted. It will also contain the exceptions taken during the trial, and those taken after trial and judgment.⁵ On appeal from an order granting or refusing a new trial, the appellate court is confined to the record on which the court below ruled.⁶ Where the appellants, in their statement on motion for a new trial, fail to specify the particulars in which the evidence is alleged to be insufficient to justify the findings, the findings of fact will not be reviewed on an appeal from an order denying a new trial.⁷ The following copy of the order of the court in denying the application for a new trial: "Now, on this day, in open court, comes on to be heard defendants' motion for a new trial, and thereupon, after having heard the arguments of counsel, the court overrules the same, to which ruling of the court defendants, by counsel, except,"

¹ Abbey Homestead Association v. Willard, 48 Cal. 619; see also People v. Armstrong, 44 Id. 327; Bush v. Taylor, 45 Id. 112; Ferrer v. Home M. I. Co., 47 Id. 427.

² Viele v. Troy and Boston R. R. Co., 20 N. Y. 184; Carman v. Pultz, 21 Id. 547.

³ Stewart v. Smith, 14 Abb. Pr. 75.

⁴ Rogers v. Beard, 20 How. Pr. 282.

⁵ Hunt v. Bloomer, 13 N. Y. 341; Magie v. Baker, 14 Id. 435; Johnson

v. Whitlock, 13 Id. 344; Brewer v. Isish, 12 How. Pr. 481.

⁶ Quivey v. Gambert, 32 Cal. 304.

⁷ Cal. Code C. P., sec. 659, subd. 3; see Kelly v. Mack, 49 Cal. 524; Coleman v. Gilmore, Id. 340; Martin v. Matfield, Id. 42; The Abbey H. A. v. Willard, 48 Id. 614; Thorne v. Hammond, 46 Id. 530; Doherty v. Enterprise Mining Co., 50 Id. 187; Spanagel v. Dellinger, 38 Id. 280.

was held not to show an appearance of the counsel of the plaintiff at the argument of the motion, and therefore did not show a waiver of the objection to the filing of the statement.¹ In a vast majority of cases there would be no occasion for a motion for a new trial if the findings were what they ought to be; for in nine cases out of ten, where the trial is by the court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this court in any form. Every such case ought to come here upon the judgment roll.² A stipulation that a statement "be used on the motion for a new trial, and also on the appeal to the supreme court," includes an appeal both from the judgment and the order on motion for new trial.³

§ 5027. **Preparing Statement.**—It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterwards give the name of the document, and at the head say "title of cause;" and where a paper is verified or acknowledged, to say "duly verified" or "duly acknowledged;" the date of the paper, date of filing, date of service, etc.—the rest may with advantage be omitted.⁴ When an appeal is taken from an order made upon other evidence, either alone or in connection with affidavits, documents not filed, judgment rolls, and files in other cases, which are not and can not be made a part of the files in the case heard, and questions of admissibility of evidence, etc., which may arise, so much of these as is necessary to present the legal points contested is made part of the record by statement, and no other method is provided.⁵ A case which refers to a paper in the judgment roll for a statement of facts and conclusions of law, and to another schedule or paper for the exceptions, is inartificial.⁶ Preparing cases in actions at law, and in equity, in the practice under the New York statute, explained.⁷

§ 5028. **When Statement Unnecessary.**—In Nevada, in appeals from orders granting or refusing a new trial, a state-

¹ Munch v. Williamson, 24 Cal. 169.

² Tewksbury v. Magraff, 33 Cal. 237.

³ Hastings v. Halleck, 13 Id. 203; Godchaux v. Mulford, 26 Id. 316; Burnett v. Pacheco, 27 Id. 409.

⁴ Marriner v. Smith, 27 Cal. 654.

⁵ Haggin v. Clark, 28 Cal. 162; see also Abbott v. Douglass, 28 Id. 290; Hutton v. Reed, 25 Id. 479; Harper v. Minor, 27 Id. 107.

⁶ Smith v. Grant, 15 N. Y. 590; Magie v. Baker, 14 Id. 435.

⁷ Lawrence v. Fowler, 20 How. Pr. 407.

ment on appeal is not necessary.¹ So from an order-made on affidavits filed.² Nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order of discharge in certain cases.³ Where no statement on appeal is required, no specification of errors is required.⁴ The statement prepared and used on the hearing of the motion for new trial in the court below will be sufficient.⁵ The affidavits must be annexed to the order in place of a statement, and the certificate of the clerk should specify the affidavits used, which should have been marked at the time as filed on the motion.⁶ But in other cases, if there is no statement on appeal, and no specification of errors, the appeal will be disregarded.⁷ Where there is no assignment of errors, or statement of the points and authorities on which the appellant relies, the appeal will be dismissed.⁸

§ 5029. **What Statement shall Contain.**—The statement shall state specifically the particular errors or grounds upon which he intends to rely on the appeal.⁹ Error will not be presumed, but must be affirmatively shown, and all intendments are in favor of the regularity of the court below.¹⁰ By an assignment of errors is meant a specification of the errors upon which appellant will rely, with such fullness as will give aid to the court in the examination of the transcript.¹¹

Errors at the trial can not be reviewed except upon a sufficient case or exceptions.¹² A statement that certain action of the court below was wrong is insufficient.¹³ The appellant must show wherein the error consists.¹⁴ And failing to specify the grounds, it forms no part of the record.¹⁵ Errors of law on motion for a new trial must be specified.¹⁶ So, also, from order made after judgment;¹⁷ from an order granting nonsuit.¹⁸ A

¹ Gregory v. Frothingham, 1 Nev. 253.

² Paine v. Linhill, 10 Cal. 370; Stone v. Stone, 17 Id. 514; Walden v. Murdock, 23 Id. 540; Haggin v. Clark, 28 Id. 162; Gray v. Harrison, 1 Nev. 502.

³ Haggin v. Clark, 28 Cal. 162.

⁴ Burnett v. Pacheco, 27 Cal. 408; Hutton v. Reed, 25 Id. 478.

⁵ Wadden v. Murdock, 23 Cal. 540; Cal. Code C. P., sec. 950.

⁶ Paine v. Linhill, 10 Cal. 370; Stone v. Stone, 17 Cal. 513.

⁷ Burnett v. Pacheco, 27 Cal. 409.

⁸ People v. Comedo, 11 Cal. 70; Id. 129.

⁹ Cal. Code C. P., secs. 659, 661.

¹⁰ Ford v. Holton, 5 Cal. 320; Todd v. Winants, 36 Id. 120; Nosler v.

Haynes, 2 Nev. 53; Champion v. Sessions, Id. 272.

¹¹ Squires v. Foorman, 10 Cal. 298.

¹² Burnett v. Pacheco, 27 Cal. 408; Otis v. Spencer, 16 N. Y. 610; S. C., 6 Abb. Pr. 127; S. C., 15 How. Pr. 425; Turner v. Haight, 16 N. Y. 465.

¹³ Crisman v. Smith, 22 Ind. 13.

¹⁴ People v. Wells, 3 Cal. 148; Ford v. Holton, 5 Id. 320; approved in Owen v. Morton, 24 Id. 378; Brown v. Tolles, 7 Id. 398; People v. Richmond, 29 Id. 414.

¹⁵ Reynolds v. Lawrence, 15 Cal. 359.

¹⁶ Barstow v. Newman, 34 Cal. 90; Loucks v. Edmondson, 18 Id. 203.

¹⁷ Leffingwell v. Griffing, 29 Cal. 192.

¹⁸ Morgan v. Thrift, 2 Cal. 562; Holverstot v. Bugby, 13 Id. 43.

general objection to the form of a verdict, without any specification of the particulars, will not be considered.¹ A specification of the particular grounds of error is the essential element; the evidence is the mere incident.² On the ground of error in improperly admitting evidence irrelevant to the issue, the irrelevancy must clearly appear; some facts should be adduced showing its admission had an undue influence upon the verdict of the jury.³ So as to the exclusion of evidence, its relevancy and the purpose for which it is offered must be stated.⁴ The naked direction of a court, unaccompanied by any facts, can not support allegations of error.⁵ Errors assigned upon instructions will not be considered, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions.⁶ An assignment of error that the verdict of the jury was against the law is improper.⁷ An assignment of error to an answer to a point propounded on the trial below must repeat the point.⁸ An objection to evidence offered and received should be specific.⁹

The supreme court can not receive evidence otherwise than through the statement or the record.¹⁰ The statement shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more;¹¹ and so much of the evidence, rulings of the court, etc., as may be necessary to explain the points relied on.¹² It is not necessary that the evidence should be in the precise words of each witness.¹³ A brief synopsis of its substance is proper.¹⁴ The bodily insertion of the reporter's notes is condemned.¹⁵ A mere rescript of the testimony by question and answer, with the objections taken and the rulings therein, will not be regarded as a compliance with section 648 of the code of civil procedure.¹⁶ It will be presumed that the statement contains all the evidence perti-

¹ *Douglass v. Kraft*, 9 Cal. 562; *Mahoney v. Van Winkle*, 21 Id. 552.

² Id.; *Wixon v. B. R. and Auburn Water and Mining Co.*, 24 Cal. 367; *Walls v. Preston*, 25 Id. 59; *Millard v. Hathaway*, 27 Id. 119; *Crowther v. Rowlandson*, 27 Id. 376; *Moore v. Murdock*, 26 Id. 524; *Burnett v. Pacheco*, 27 Id. 410.

³ See Cal. Code C. P., sec. 661; *McGarrity v. Byington*, 12 Cal. 426; *Green v. Killey*, 38 Id. 201.

⁴ *Roberts v. Unger*, 30 Cal. 676.

⁵ *White v. Abernathy*, 3 Cal. 426.

⁶ *Nelson v. Mitchell*, 10 Cal. 92.

⁷ *Schofield v. Ferrers*, 46 Pa. St. 438.

⁸ *Ditmars v. Commonwealth*, 47 Pa. St. 335.

⁹ *Cullum v. Wagstaff*, 48 Pa. St. 300.

¹⁰ *Visher v. Webster*, 13 Cal. 58.

¹¹ Cal. Code C. P., sec. 648; *Hutton v. Reed*, 25 Cal. 478; *Haggin v. Clark*, 28 Id. 162.

¹² *Hutton v. Reed*, 25 Cal. 478; *Stone v. Stone*, 17 Id. 513.

¹³ *Battersby v. Abbott*, 9 Cal. 565.

¹⁴ *Ross v. Roadhouse*, 36 Cal. 581.

¹⁵ *People v. Getty*, 49 Cal. 584.

¹⁶ *Caldwell v. Parks*, 50 Cal. 502.

ment to the motion.¹ A reference to the evidence as taken by the clerk is sufficient, the evidence being in the transcript. The statement need not contain the evidence.² Where the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence.³

§ 5030. **Minutes of the Court.**—The minutes of the court, to form part of the record, must be embodied in the statement or bill of exceptions.⁴ Instead of copying deeds and transcripts of record, where no point is made on the construction of the language, a brief statement of the instrument answers every purpose.⁵

§ 5031. **Skeleton Statement.**—A statement containing the words “here insert,” etc., describing writ, omitting without consent documents thus directed to be inserted in the statement as settled, will be stricken from the transcript on appeal.⁶ When documentary evidence is referred to in a statement on motion for a new trial, the appellant can not, without the assent of the other party, insert copies of the same in the transcript on appeal, unless the statement has been engrossed as settled and authenticated, or unless the originals are on the files of the court or constitute a part of the records.⁷ So much of instruments, when objected to as evidence, should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken.⁸

§ 5032. **Written Instruments, etc.**—Where a notice of motion to dismiss a complaint on specific grounds is given, to review the order made, the record must disclose the papers read or the evidence offered in their support.⁹ No errors can be assigned on an instrument not embodied in the statement on appeal.¹⁰ So where affidavits are used in support of a motion for new trial, the affidavits must be set forth, but the omission does not affect his right to raise the question as to errors apparent on the face of the record.¹¹ Where a written or printed instrument, as a newspaper “card,” is rejected as evidence in the court below, such evidence or the substance of it must be returned with the record.¹² Interlocutory orders must be embodied in a state-

¹ Smith v. Athern, 34 Cal. 506.

² Dart v. Rush, 14 Cal. 81.

³ Moore v. Tice, 22 Cal. 514.

⁴ Dawley v. Hovious, 23 Cal. 103; Harper v. Minor, 27 Id. 107; Moore v. Del Valle, 28 Id. 174; Abbott v. Douglass, Id. 299; Mendocino Co. v. Morris, 32 Id. 145; People v. Empira G. & S. M. Co., 33 Id. 171.

⁵ Knowles v. Inches, 12 Cal. 212.

⁶ Kimball v. Semple, 31 Cal. 657; see “New Trial,” *ante*.

⁷ Id.

⁸ Provost v. Piper, 9 Cal. 552.

⁹ Freeborn v. Glazier, 10 Cal. 337.

¹⁰ Moore v. Semple, 11 Cal. 360.

¹¹ Branger v. Chevalier, 9 Cal. 353.

¹² Dwinelle v. Henriquez, 1 Cal. 387.

ment or bill of exceptions.¹ From a decision on *habeas corpus*, the facts on which such decision was based must be presented.² A stipulation inserted in the transcript, and not embodied in the statement or bill of exceptions, forms no part of the record.³

§ 5033. **Filing and Serving Statement.**—A statement on appeal must be filed within the time prescribed by law or the right is waived.⁴ Moving for a new trial does not of itself operate to extend the time for filing a statement.⁵ If notice of appeal be regularly served and filed, but no case or exceptions be filed within the statutory time, the appeal is left upon the judgment roll.⁶ If the appealed case is submitted on briefs, and they are not filed within the time specified, and the transcript contains no assignment of errors, the judgment will be affirmed.⁷ In New York a case or exceptions can not form part of the papers on an appeal unless filed prior to entry of judgment, or unless an order be obtained authorizing the case or exceptions to be annexed to and form part of the judgment roll.⁸ The court refused to remand the cause for the purpose of amending the bill; but the court declined to decide that a new bill, with proper amendments, could not be filed.⁹ The time for preparing and filing a statement may be enlarged upon good cause shown.¹⁰ The time for filing statement may be extended thirty days beyond the twenty days allowed by statute;¹¹ and if more than thirty days' extension is granted, is good for the thirty days without consent of opposite party.¹² Until the time or its extension given to file a case after its settlement has expired the case can not be noticed for argument.¹³ After a statement is settled and filed, and becomes a record, it may be taken in the further progress of the action as *prima facie* evidence of the facts therein appearing.¹⁴

¹ Abbott v. Douglass, 28 Cal. 293.

² Ex parte Cleveland, 36 Ala. 306.

³ Ritter v. Mason, 11 Cal. 214.

⁴ Heihn v. Stansbury, 12 Cal. 412; Lafferty v. Brownlee, 11 Id. 132; Harper v. Minor, 27 Id. 107; Ryan v. Dougherty, 30 Id. 221; Quivey v. Gambert, 32 Id. 312; McIntyre v. Willis, 20 Id. 177; Farnsworth v. Coquillard, 22 Ind. 453.

⁵ Bryan v. Maume, 28 Cal. 238; Harper v. Minor, *supra*; Mahoney v. Caperton, 15 Id. 313. For the time within which statements and bills of exceptions must be prepared and settled, see Cal. Code C. P., secs. 650, 659, 661.

⁶ Robinson v. Hudson Riv. R. R. Co., 3 Abb. Pr. 115; Conolly v. Conolly, 16 How. Pr. 224.

⁷ Holm v. Roach, 25 Cal. 37.

⁸ Anderson v. Dickie, 26 How. Pr. 199.

⁹ Mulford v. Cohn, 18 Cal. 42.

¹⁰ Cal. Code C. P., secs. 650, 651, 661.

¹¹ Cal. Code C. P., sec. 1054; Bryan v. Maume, 28 Cal. 238.

¹² Id.

¹³ Donahue v. Hicks, 21 How. Pr. 438.

¹⁴ Van Bergen v. Ackles, 21 How. Pr. 314.

§ 5034. Notice of Settlement on Bill of Exceptions on Appeal.

Form No. 1162.

[TITLE.]

To, attorney for defendant.

Please take notice that the proposed bill of exceptions of the plaintiff herein, and the defendant's amendments thereto, will be presented to the judge of this court for settlement on the day of, 18.., at o'clock A. M., at his chambers in the court-house, at, in said county.

[SIGNATURE.]

§ 5035. Amendments.—After the draft of the bill of exceptions has been served on the opposite party, ten days are allowed within which to prepare and serve amendments thereto. The statement and amendments which may be served shall be presented to the judge who tried or heard the case, within ten days thereafter, upon notice of five days to the respondent, and a true statement shall thereupon be settled by the judge. If no amendments are served, then without any notice to the respondent.¹ Unless the respondent serves and files amendments within five days after service and filing of statement, he is deemed to have agreed to the statement;² or the judge, without notice to the respondent, may settle and authenticate it.³ A party is not at liberty to serve an entire new case as an amendment, without special leave from the court.⁴

§ 5036. Authentication of Statement.—The statement, when settled by the judge, shall be signed by him, with his certificate that the same has been allowed and is correct; or the attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the clerk.⁵ A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judicial officer.⁶ If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct.⁷ This provision also applies to the

¹ Cal. Code C. P., sec. 650.

² Connor v. Morris, 23 Cal. 447; Bryam v. Maume, 28 Id. 238; Kavanaugh v. Maus, 28 Id. 261.

³ Id.

⁴ Stuart v. Binsse, 4 Bosw. 616.

⁵ Cal. Code C. P., sec. 650.

⁶ Id., sec. 653.

⁷ Id.

settlement and certifying of statements.¹ The certificate of a judge is a sufficient authentication that the statement is substantially correct.² But a statement certified by the judge to be correct according to his recollection is not sufficient.³ The authentication of the judge or attorneys should be indorsed on the engrossed statement.⁴ A judge can revoke his certificate during the term at which judgment was rendered, but after the term he can not.⁵ An authentication need not affirmatively show that the settlement was upon proper notice or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts.⁶

§ 5037. **Authentication Insufficient.**—An indorsement by the judge at the bottom of a statement made in motion for a new trial, that the amendments to the statement were allowed, is not sufficient authentication.⁷ So a clerk's certificate that a statement is the same which was used on motion for a new trial is entitled to no weight.⁸ No mode of authentication is pointed out by the statute, and any satisfactory evidence that the statement has been examined and approved by the judge is sufficient.⁹ An unauthenticated document purporting to be a statement on motion for new trial will be stricken from the transcript on appeal.¹⁰ And if a second statement is afterwards brought up, duly certified, but defective, the two statements can not be used in connection.¹¹ Where a party appears and argues a motion for a new trial, it is a waiver of want of settlement and an authentication.¹²

§ 5038. **Correcting Statement.**—The supreme court will not amend a statement by adding thereto facts which occurred in the court below during the trial. The record in the supreme court must remain as settled in the court below.¹³ A motion to correct a statement on exceptions is an original proceeding in the supreme court, and must be instituted by a petition in writing, which petition should be presented with the record and the application made before the case is submitted.¹⁴ Orders which the court of appeals has no jurisdiction to review, and

¹ Cal. Code C. P., sec. 653.

² Redman v. Gulnac, 5 Cal. 148; Battersby v. Abbott, 9 Id. 565.

³ Van Pelt v. Settler, 14 Cal. 194.

⁴ Kimball v. Semple, 31 Cal. 657.

⁵ Branger v. Chevalier, 9 Cal. 172.

⁶ Battersby v. Abbott, 9 Cal. 565.

⁷ Baldwin v. Ferre, 23 Cal. 462.

⁸ Fee v. Starr, 13 Cal. 170.

⁹ Kidd v. Laird, 15 Cal. 161.

¹⁰ Kimball v. Semple, 31 Cal. 657.

¹¹ Id.; Whitmore v. Shiverick, 3 Nev. 288.

¹² Dickinson v. Van Horn, 9 Cal. 207; Williams v. Gregory, Id. 76; see Morris v. Angle, 42 Id. 236.

¹³ Satterlee v. Bliss, 36 Cal. 489.

¹⁴ Wormouth v. Gardner, 35 Cal. 227.

the papers upon which such orders were granted will be stricken out on motion.¹ But imperfections in form should not be disregarded.²

§ 5039. **Engrossing Statement.**—Where amendments are made to a statement, a fair copy of the statement so amended must be made;³ or where deeds or documentary evidence are directed to be inserted.⁴

§ 5040. **Objection to Statement.**—The place to object to immaterial matter in a statement is where it is made up and settled. If immaterial matter is introduced, and that fact is made to appear in the records, the party insisting on its introduction will be taxed with the costs of the immaterial matter.⁵

§ 5041. **Resettlement.**—After a case has been once settled a resettlement of the case, restatement, and refinding of facts is not to be allowed.⁶

§ 5042. **Statement must be Made.**—A party appealing must make his case and have it settled with such statement of facts as will necessarily show the law is in his favor; if not, every intendment not unreasonable in itself will be against him.⁷ A statement will not be regarded unless it is agreed to by the attorneys of the respective parties, or settled and authenticated by the court.⁸ The settlement of a case is a judicial and not a ministerial act.⁹ In New York the case must be settled by the court below, and be inserted in the record, and should contain, not the evidence, but only the conclusions of fact drawn from the evidence by the court below.¹⁰ Where before settlement the judge who tried the case died, the case might be presented upon affidavits.¹¹ A writ of mandate may issue to compel a judge to settle a statement made on motion for a new trial in an insolvent case.¹²

§ 5043. **Settlement, Effect of.**—The supreme court can only look to the statement as settled by the court below, to determine the character and the point of the objection made on the trial to the introduction of proposed evidence. They can

¹ Smith v. Grant, 15 N. Y. 590.

² Ringgold v. Haven, 1 Cal. 113.

³ Marlow v. Marsh, 9 Cal. 259; Skillman v. Riley, 10 Id. 300; Kimball v. Semple, 31 Id. 661.

⁴ Id.

⁵ Kimball v. Semple, 31 Cal. 658.

⁶ Catlin v. Cole, 10 Abb. Pr. 389; Bitting v. Vandenburg, 17 How. Pr. 82.

⁷ Phelps v. McDonald, 26 N. Y. 82; Bissell v. Pierce, 28 Id. 252.

⁸ Kavanagh v. Maus, 28 Cal. 261; Cosgrove v. Johnson, 30 Id. 509; Burnett v. Pacheco, 27 Id. 408.

⁹ Fielden v. Lahens, 14 Abb. Pr. 48.

¹⁰ Reid v. Rensselaer Glass Factory, 3 Cow. 387; Feeter v. Heath, 11 Wend. 479; Melvin v. Leaycraft, 17 Id. 169; People v. Superior Court, 20 Id. 663; Easterly v. Cole, 3 N. Y. 502.

¹¹ Morse v. Evans, 6 How. Pr. 445; but see Cal. Code C. P., sec. 653.

¹² People v. Rosborough, 29 Cal. 415.

not consult the opinion of the judge in passing upon the motion for a new trial, to discover the real point of objection.¹ A case as settled is deemed to contain a true statement of the facts as found.² On appeal from an order granting or denying a new trial there is no necessity for preparing a statement on appeal, the statement on motion for new trial being sufficient.³ A statement when agreed on by the parties should not probably be amended, except under a very clear showing of mistake or fraud.⁴ A bill of exceptions when settled and filed becomes part of the judgment roll.⁵

§ 5044. **Special Proceedings.**—The statute does not require the board of equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal.⁶ In contested election cases, where the appellant assigns as error the improper rejection by the court below of the votes cast in his favor, and a statement is made part of the record, it is competent for the respondent, by way of amendment thereto, to incorporate in the statement the fact that other votes cast for him were likewise erroneously rejected by the court below.⁷

§ 5045. **Stipulation of Attorneys.**—Where counsel, in a cause pending in the supreme court, stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation.⁸

§ 5046. **Time for Settlement.**—Statements and exceptions should be speedily settled.⁹ A case should be presented for settlement without unnecessary delay.¹⁰ The bill of exceptions must be settled in time, or it will be stricken from the record.¹¹

§ 5047. **Appeal from the Judgment Roll.**—Where there is no statement on appeal it stands on the judgment roll,¹² as

¹ Cochran v. O'Keefe, 34 Cal. 557.

² Hartman v. Proudfit, 6 Bosw. 191.

³ Loucks v. Edmondson, 18 Cal. 203.

⁴ Hutchinson v. Bours, 13 Cal. 50.

⁵ Higgins v. Mahoney, 50 Cal. 444; Caldwell v. Parks, 47 Id. 640.

⁶ Central Pacific Railroad Co. v. Placer Co., 32 Cal. 582.

⁷ Webster v. Byrnes, 34 Cal. 273.

⁸ Cahoon v. Levy, 10 Cal. 216.

⁹ Hutchinson v. Bours, 13 Cal. 50.

¹⁰ Whiting v. Kimball, 6 Bosw. 690.

¹¹ Cameron v. Sullivan, 15 Wis. 510; Lee v. Tillotson, 4 Hill, 27.

¹² Am. Riv. Wat. and Min. Co. v. Bear Riv. Wat. and Min. Co., 11 Cal. 340; McGill v. Rainaldi, Id. 391; Newberg v. Henson, 12 Id. 280.

on denial of motion for a new trial.¹ And in case of denial of motion for a new trial on the appeal from the judgment, the statement on motion for a new trial forms part of the record;² and may be used on appeal from the order.³ An appeal may be taken from the judgment of the superior court without moving for a new trial in that court.⁴ But on appeal from a judgment without a statement, nothing belongs to the record except the judgment roll, and no question arising outside of the roll can be considered.⁵ If a judgment by default was entered on a demurrer overruled, and the judgment roll did not disclose what action was taken on the demurrer, the presumption is that the proceedings were regular.⁶ On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.⁷ The appeal may be heard on the record, consisting of the order appealed from, and the affidavits identified in the mode prescribed by law.⁸ Where the evidence is not set out in a statement on appeal, the court will presume that the court below had good reason for granting a new trial.⁹ One who alleges error must rely on the record to disclose it,¹⁰ as error will not be presumed.¹¹ Every intendment is in favor of a decision of the court below.¹² But where error is shown, the presumption is that appellant has been prejudiced by it, and it is incumbent on respondent to see that the record discloses the fact that appellant has not been so prejudiced.¹³ Where the court tries the cause without a jury, the proper mode of reserving questions of law is to ask the court to decide them and note the refusal in a bill of exceptions.¹⁴ To make an exception available, it must appear that the precise question intended to be raised was brought to the attention of the court below.¹⁵

¹ *Burdge v. Gold Hill etc. Water Co.*, 15 Cal. 198; *McIntyre v. Willis*, 20 Id. 177.

² *Solomon v. Reese*, 34 Cal. 23; *Towdy v. Ellis*, 22 Id. 651; *Carpenter v. Williamson*, 25 Id. 154.

³ *Casgrave v. Howland*, 24 Cal. 457; *Waldron v. Murdock*, 23 Id. 540; see Cal. Code C. P., sec. 950.

⁴ *Innis v. The Steamer Senator*, 1 Cal. 459.

⁵ *Wetherbee v. Carroll*, 33 Cal. 549.

⁶ *Abadie v. Carrillo*, 32 Cal. 172.

⁷ Cal. Code C. P., sec. 951.

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⁸ *Wetherbee v. Carroll*, 33 Cal. 554.

⁹ *Dickinson v. Van Horn*, 9 Cal. 207.

¹⁰ *Waldie v. Doll*, 29 Cal. 555.

¹¹ *Dimick v. Campbell*, 31 Cal. 238.

¹² *Landers v. Bolton*, 26 Cal. 393; *People v. Quincy*, 8 Id. 89; *De Johnson v. Sepulbeda*, 5 Id. 149.

¹³ *Norwood v. Kentfield*, 30 Cal. 393; *Jackson v. Feather River Wat. Co.*, 14 Id. 18.

¹⁴ *Griswold v. Sharpe*, 2 Cal. 17.

¹⁵ *Walsh v. Wash. Ins. Co.*, 32 N. Y. 440.

§ 5048. **Bill of Exceptions.**—An appeal can be heard on a bill of exceptions taken at the trial if signed by the judge.¹ Appellant may have questions of law reviewed by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions,² and only such orders and rulings as the appellant desires to have reviewed.³ The supreme court of Nevada has never held it indispensable that a statement should be made in the court below of the grounds relied on upon appeal. The exceptions to the ruling of the court below will be treated as a substitute.⁴ In the statute a statement and bill of exceptions on this subject mean the same thing.⁵ An appeal from the judgment only brings under review such rulings on the trial as are duly excepted to.⁶ Where no bill of exceptions has been filed, a judgment of the court below will not be disturbed for errors not apparent upon the record.⁷ Where the ruling of the court appears on the record, a bill of exceptions is unnecessary.⁸

§ 5049. **What a Bill of Exceptions should Contain.**—Documents and affidavits to be reviewed by the appellate court must be embodied in a bill of exceptions or record.⁹ Writings, if not embodied in a bill of exceptions, should be unmistakably marked or identified, so as to leave no doubt as to what is referred to,¹⁰ as affidavits in support of a motion,¹¹ or affidavits as to incompetency of a juror.¹² Affidavits used on motion to open the judgment form no part of the record, where there is no certificate of the clerk or admission of counsel that they were used for that purpose.¹³ And to review intermediate orders on an appeal from the final judgment, such orders must be made a

¹ De Johnson v. Sepulbeda, 5 Cal. 149.

² Hunt v. Bloomer, 3 Kern. 341, 344; Harper v. Minor, 27 Cal. 107; Treadwell v. Davis, 34 Id. 604; Gates v. Walker, 35 Id. 289.

³ Harper v. Minor, 27 Cal. 107.

⁴ Gillig v. Lake Bigler Road Co., 2 Nev. 214.

⁵ People v. Lee, 14 Cal. 510.

⁶ Letter v. Putney, 7 Cal. 423; Castro v. Gill, 5 Id. 42; Keyes v. Devlin, 3 E. D. Smith, 518; Gelston v. Hoyt, 13 Johns. 561; Coon v. Syracuse and Utica R. R. Co., 5 N. Y. 492; Franklin v. Osgood, 14 Johns. 527. For the principles on which the above rule is founded, see Sands v. Hildreth, 12 Id. 493; Ketchum v. Evartson, 13 Id. 361; Henry v. Cuyler, 17 Id. 469;

Colden v. Knickerbacker, 2 Cow. 31; Campbell v. Stakes, 2 Wend. 146; Houghton v. Starr, 4 Id. 179; Wood v. Young, 5 Id. 620.

⁷ Scott v. Cook, 1 Or. 24.

⁸ People v. Maguire, 26 Cal. 635; Cunningham v. Wheatley, 21 Tex. 184.

⁹ Gates v. Buckingham, 4 Cal. 286; Ritter v. Mason, 11 Id. 214; Moore v. Semple, Id. 360.

¹⁰ Lyons v. Thompson, 16 Iowa, 62.

¹¹ People v. Honshell, 10 Cal. 83; People v. Martin, 32 Id. 92; Harman v. State, 22 Ind. 331.

¹² People v. Honshell, 10 Cal. 86, affirming People v. Stonecifer, 6 Id. 411.

¹³ Ritter v. Mason, 11 Id. 214.

part of the record by a bill of exceptions.¹ An order striking out a statement on motion for a new trial can not be brought before the supreme court by a bill of exceptions.² It is not necessary to embody matter of record in a bill of exceptions.³ A bill of exceptions stating "that thereupon plaintiff filed his certain motion, with affidavits attached, to set aside said verdict, does not refer to the affidavits so as to make them part of the record."⁴ If a bill of exceptions made to an order dismissing a motion for a new trial recites the giving of a notice and the different steps taken in prosecuting the motion, it will be received as evidence of the facts recited, without including notice, statement, etc., in the transcript.⁵

§ 5050. **Filing and Settlement of Bill of Exceptions.**—Bills of exceptions made during the progress of the trial should be written down, settled and signed by the judge, filed in the case, and be annexed to the judgment roll.⁶ A bill of exceptions may be filed by the judge at his own instance, and will in such case become a part of the record.⁷ A bill of exceptions can not be filed by the judge after the time given, at least not without the consent of all parties.⁸ The fact that a bill of exceptions was not signed until more than ten days after the trial can not defeat a party's right to appeal.⁹ A certificate of the judge, made eight years after the trial, that he believed the exceptions were correctly noted in the clerk's minutes of testimony, can not supply the place of a bill of exceptions.¹⁰ When it appears from the bill of exceptions, signed by the judge, that the motion for new trial was heard on statement, counter-statement, and affidavits, it can not be objected that the statement was not settled.¹¹ A bill of exceptions taken during the trial is a part of the judgment roll.¹² Bills of exceptions settled after trial and judgment, though not technically a part of the judgment roll, are filed by the clerk, and become part of the record on appeal.¹³

§ 5051. **Exceptions to Evidence.**—An exception to admission of evidence, stating no grounds, will not be considered.¹⁴

¹ Cornell v. Davis, 16 Wis. 686.

² Quivey v. Gambert, 32 Cal. 304; see Calderwood v. Peyser, 42 Id. 110.

³ De Johnson v. Sepulbeda, 5 Cal. 149.

⁴ Moffit v. Rogers, 15 Iowa, 453.

⁵ Warden v. Mendocino Co., 32 Cal. 655.

⁶ More v. Del Valle, 28 Cal. 170; People v. Empire G. & S. M. Co., 33 Id. 173; Wetherbee v. Carroll, Id. 553.

⁷ Shepherd v. Brenton, 15 Iowa, 84.

⁸ Swinney v. Nave, 22 Ind. 178.

⁹ People v. Martin, 6 Cal. 477.

¹⁰ Castro's Ex'rs v. Armesti, 14 Cal. 38.

¹¹ Williams v. Gregory, 9 Cal. 76.

¹² Cal. Code C. P., sec. 670.

¹³ Id., sec. 950.

¹⁴ Miller v. Duff, 34 Wis. 167; Voorman v. Voight, 46 Cal. 392.

In a trial by the court the bill of exceptions must show what evidence was given on the trial, and the exceptions taken to the finding.¹ Exceptions will not be sustained which simply show that incompetent declarations were admitted in evidence, without showing what those declarations were.² A statement in a bill of exceptions, that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty.³

§ 5052. **Exceptions to Findings.**—A defective finding of facts is not a ground for reversing a judgment, when that defect is not noticed or complained of in the court below.⁴ A defective specification of grounds, explaining the points of objection, is not cured by the assignments in the exceptions taken to the findings.⁵

§ 5053. **Exceptions to Instructions.**—It is the duty of appellant to incorporate instruction to which he objected in his bill of exceptions.⁶ To enable the supreme court to pass upon the propriety of modified instructions, the instructions, as asked, should be before the court, and also the modifications, as made by the court below.⁷ Exceptions to instructions given or refused by the court should be specific.⁸

§ 5054. **Exceptions to Rulings.**—Where an exception is taken to the decision of a court refusing a nonsuit, on settlement of the bill the plaintiff must see that all the evidence material for him is inserted in the bill of exceptions.⁹ A trial before a referee should be conducted in the same manner as a trial before the court, and the evidence should be embodied in a bill of exceptions certified by the referee.¹⁰ In a bill of exceptions, the words, "the foregoing was all the evidence given in the cause," are sufficient to exclude the presumption of other evidence.¹¹

§ 5055. **Transcript on Appeal.**—It is the duty of the appellant to furnish the supreme court with a complete, clean, properly arranged, and properly authenticated transcript;¹² to

¹ Concanon v. Blake, 16 Wis. 518.

² Hacket v. King, 8 Allen, 144.

³ Page v. O'Brien, 36 Cal. 559.

⁴ McClusky v. Gerhauser, 2 Nev. 47.

⁵ Harper v. Minor, 27 Cal. 107.

⁶ Hicks v. Britt, 21 Ark. 422.

⁷ Boies v. Henney, 32 Ill. 130.

⁸ Baker v. McGinniss, 22 Ind. 257.

⁹ Ringgold v. Haven, 1 Cal. 108;

Dickenson v. Van Horn, 9 Id. 210, 211.

¹⁰ Goodrich v. City of Marysville, 5 Cal. 431; Phelps v. Peabody, 7 Id. 52.

¹¹ Ford v. Mitchell, 21 Ind. 54; Estep v. Larsh, Id. 183; Branham v. Bradford, 17 Id. 47.

¹² Kimball v. Semple, 31 Cal. 657.

attend to clerical and typographical errors, and see that the transcript is a true copy of the original in all respects other than maps and surveys.¹ Pleadings, proceedings, and statement shall be chronologically arranged, and each transcript shall be prefaced with an alphabetical index to its contents, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness, and the transcript shall have at least one blank fly-sheet cover.² It must be duly certified to be correct by the attorneys of the parties plaintiff and defendant, or by the clerk of the court from which the appeal is taken.³ The object of this rule is to enable the attorneys to make up the record, and by omitting useless and superfluous matter save expense, facilitate the examination, and hasten the decision.⁴ The transcript of records in civil cases must be printed.⁵ The party filing the transcript, or the clerk of the court, may print the same, and the printed transcript, certified, shall be filed, and constitute the record of the cause in the appellate court.⁶

§ 5056. **Filing Transcript.**—In all cases where an appeal has been perfected the transcript shall be filed within forty days.⁷ The time may be extended by stipulation, but the court can not extend it more than twenty days.⁸ If not filed within the time prescribed, the appeal may be dismissed on motion made during the first week of the term, without notice.⁹ It has been held by the United States supreme court that the general rule that transcript of record must be filed, and the case docketed at the term next succeeding the appeal, has, however, exceptions; as where appellant is prevented from seasonably obtaining the transcript, by fraud of the other party, or by the ill-founded order of the court below.¹⁰ Under the statute of Iowa, it is the duty of the appellant to file a perfect transcript.¹¹

§ 5057. **Service of Transcript.**—As soon as practicable after being printed, and at or before the time of filing the same, a printed copy shall be served on the attorney of the adverse party, and if there be more than one adverse party, on the attorney of each party appearing by attorney.¹² A failure of such service is not a ground for dismissing the appeal if reasonable

¹ *Franklin v. Goodman*, 31 Cal. 458.

² Cal. Sup. Ct., rule 6.

³ Cal. Sup. Ct., rule 2; Cal. Code C. P., sec. 953.

⁴ *Estate of Boyd*, 25 Cal. 511.

⁵ As to directions, see Cal. Sup. Ct., rule 5.

⁶ Cal. Sup. Ct., rule 10.

⁷ Cal. Sup. Ct., rule 2.

⁸ Id.

⁹ Id., rule 3.

¹⁰ *United States v. Gomez*, 3 Wall. 752; see also *Thompson v. Blanchard*, 2 N. Y. 561.

¹¹ *Hall v. Smith*, 15 Iowa, 584.

¹² Cal. Sup. Ct., rule 9.

diligence is used; but respondent may object to a hearing at the first term if service is not made in time for him to prepare for argument.¹ Service should be made before or at the time of filing, and if the transcript is printed by the clerk, the appellant should direct the clerk to forward him copies as soon as printed for service.² Besides the original, there shall be filed fourteen copies of the transcript, and points and authorities, and statement of facts, which copies shall be distributed by the clerk as prescribed by law.³

§ 5058. **What the Transcript must Contain.**—On appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court,⁴ or any bill of exceptions settled,⁵ or used on motion for a new trial, may be used on appeal from a final judgment equally as on appeal from the order granting or refusing a new trial.⁶ On appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment, or order appealed from, and of papers used on the hearing in the court below.⁷ On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section 661 of the code.⁸ These copies must be arranged in their chronological order, and to them must be added, in cases in which it is necessary, an assignment of errors, and a stipulation of the attorneys, or the certificate of the clerk, that the transcript is correct, and that the necessary bond on appeal has been given, or that the same has been waived by stipulation.

§ 5059. **Form of Stipulation.**

Form No. 1163.

It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite undertaking on appeal was given and

¹ Estate of Boyd, 25 Cal. 512.

² Id.

³ Cal. Sup. Ct., rule 2, subd. 9. See rules of the supreme court of California, adopted in 1880.

⁴ As provided in Cal. C. C. P., sec. 661.

⁵ As provided in Id., secs. 649, 650.

⁶ Cal. Code C. P., sec. 950.

⁷ Id., sec. 951.

⁸ Id., sec. 952.

filed within the time prescribed by law [or that an undertaking on appeal is hereby expressly waived by the respondent]; that the foregoing is a full, true, and correct transcript, and that the appeal herein may be heard thereon.

A. B., Attorney for Appellant.

C. D., Attorney for Respondent.

§ 5060. **Affidavits and Documents.**—Affidavits or documents copied into the transcript, but not certified by the clerk or judge, or not presented by statement or bill of exceptions, can not be considered.¹ So of affidavits used on motion to open the judgment;² nor the affidavit of one of the attorneys, showing the objections made to the selection of the jury.³ The certificate of the judge, of the matters read or referred to, where documents and depositions were used on a motion for new trial, will be sufficient identification of the documents and depositions used;⁴ and a copy of such papers used on the hearing of the motion must be furnished.⁵ So, on a review of an order, on motion to dismiss a complaint on specified grounds.⁶ Affidavits filed in opposition to an application for an injunction are part of the record, and may be considered, though not embraced in the statement.⁷

§ 5061. **Copy of Map.**—The appellate court does not examine the original transcript in the clerk's office, unless it contains the only copy of a map or survey.⁸ But one copy of any map or survey need be furnished.⁹

§ 5062 **Findings.**—Where a cause is tried by a judge alone, the record should disclose a finding by him of the facts, and a statement of his conclusions of law upon the facts.¹⁰ The decision of the court must be given in writing and filed with the clerk, and the facts found and conclusions of law must be separately stated. Findings of fact, however, may be waived by the parties.¹¹

§ 5063. **Judgment Roll.**—If the transcript does not contain all the judgment roll, but contains all that is necessary, the defect is waived by stipulation that it contains all that is necessary for the purpose of the appeal.¹² But the transcript should

¹ Gordon v. Clark, 22 Cal. 534; Stone v. Stone, 17 Id. 513; People v. Houshell, 10 Id. 83.

² Ritter v. Mason, 11 Cal. 214.

³ Magee v. Mok. Hill Canal and Min. Co., 5 Cal. 258.

⁴ Loucks v. Edmondson, 18 Cal. 203; Walden v. Murdock, 23 Id. 549.

⁵ Same authorities, and Bodley v. Ferguson, 25 Cal. 584.

⁶ Freeborn v. Glazier, 10 Cal. 337.

⁷ Gagliardo v. Crippin, 22 Cal. 362.

⁸ Franklin v. Goodman, 31 Cal. 458.

⁹ Cal. Sup. Ct., rule 7.

¹⁰ Hoagland v. Clary, 2 Cal. 474.

¹¹ See Cal. Code C. P., secs. 632-634.

¹² Solomon v. Reese, 34 Cal. 28.

always contain enough of the record of the court below to fully present the question, and show the materiality of the point relied on to reverse the judgment or order; and generally, whenever a pleading or other paper has been necessarily used on the hearing by the court below, a copy of the pleading or an agreed statement of the contents of so much, at least, as is relevant to the point in issue should be furnished in the transcript.¹ The fact that a record is erroneous in stating that the parties waived a jury can not be shown by an affidavit of the judge who tried the cause.²

§ 5064. **Motions.**—A motion is no part of a record, and its indorsement by the judge as “correct” does not make it so.³

§ 5065. **New Trial.**—On appeal from an order denying a new trial, the appellant is only required to furnish copies of the notice of appeal, order appealed from, and of the papers used on the hearing of the motion.⁴ Subsequent decisions seem, however, to require more. Evidence of service of the notice of motion must be contained in the record, or it must clearly appear that service was waived.⁵ The transcript must also contain an authenticated copy of the pleadings, or an agreed statement of their contents;⁶ or such pleadings, depositions, and minutes as were read or referred to on the hearing, identified by the certificate of the judge, and the affidavits and statement upon which the motion was made.⁷ There is no necessity of preparing a statement on appeal from an order granting or refusing a new trial, the statement on motion for new trial being sufficient.⁸ It is not necessary in all cases to bring up the pleadings in full. A summary will, in most cases, answer every purpose on appeal, if it be agreed to by the attorneys of the parties.⁹ When the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself on the record.¹⁰ If a new trial has been denied, on the ground that the evidence is insufficient to sustain the cause of action, an authenticated copy or an agreed statement of the pleadings must be included in the transcript.¹¹ An appellate court will not consider an order on motion for a new trial, when the motion, judgment, and pleadings are only presented

¹ McQuade v. Whaley, 29 Cal. 614.

² Smith v. Brannan, 13 Cal. 115.

³ Thompson v. Buckenstos, 1 Or. 17.

⁴ Wakeman v. Coleman, 28 Cal. 58.

⁵ Calderwood v. Brooks, 28 Cal. 151.

⁶ McQuade v. Whaley, 29 Cal. 612.

⁷ Wetherbee v. Carroll, 33 Cal. 549.

⁸ Loucks v. Edmondson, 18 Cal. 203.

⁹ Todd v. Winants, 36 Cal. 129.

¹⁰ Harper v. Minor, 27 Cal. 108.

¹¹ McQuade v. Whaley, 29 Cal. 612; Wetherbee v. Carroll, 33 Id. 549.

to it by a bill of exceptions.¹ An appeal was taken from a judgment of nonsuit, and an order denying a motion for a new trial. The transcript on appeal consisted of the statement on motion for a new trial, and a stipulation that said motion was denied, that the appeal was duly taken and perfected, and "that the foregoing transcript is correct:" it was held that in the absence of the pleadings, or a statement of the issues, this court can not ascertain whether the court below erred in granting the nonsuit, and the judgment will be affirmed.²

§ 5066. **Notice of Appeal.**—The transcript must show that notice of appeal has been duly served upon the other side.³ A waiver of the filing by stipulation of the parties is not equivalent to the filing of the notice; for consent, though it may waive error, can not confer jurisdiction.⁴

§ 5067. **Order after Judgment.**—On an appeal from an order after judgment, the transcript should contain a copy of the order appealed from, and copies of all papers used on the hearing.⁵ And if based on affidavits and other evidence, it must contain a statement made and settled in the mode prescribed for the making and settling statements on appeals from final judgments.⁶

§ 5068. **Order Based on Evidence.**—When an appeal is from an order based on evidence other than affidavits, the record consists of the order appealed from and a statement prepared and settled, containing so much of said evidence as is necessary to present the points relied on.⁷ The appellate court can not reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before it.⁸

§ 5069. **Pleadings.**—On an appeal from a final judgment, the transcript must contain a copy of the pleadings.⁹ Attorneys may agree as to the contents of the pleadings, and introduce into the transcript such agreement, instead of printing the entire pleadings.¹⁰ But if an amended complaint or answer is filed, and no question arises on the original pleadings, it is not

¹ N. O. R. R. Co. v. Albritton, 38 Miss. 242.

² Todd v. Winants, 36 Cal. 129.

³ Franklin v. Reiner, 8 Cal. 340; Western Pacific R. R. Co. v. Reed, 35 Id. 621; Carr v. State, 1 Kan. 331.

⁴ Bonds v. Hickman, 29 Cal. 463; Low v. Rice, 8 Johns. 409; Carr v. State, 1 Kan. 331.

⁵ Cal. Code C. P., sec. 951; Glidden v. Packard, 28 Cal. 649.

⁶ Wetherbee v. Carroll, 33 Cal. 549.

⁷ Id.

⁸ State v. Bonds, 2 Nev. 265.

⁹ Cal. Code C. P., sec. 950; Hart v. Plum, 14 Cal. 148.

¹⁰ This course should be pursued in all cases where no point is made on them: McQuade v. Whaley, 29 Cal. 612.

necessary to include them in the transcript.¹ A statement of the contents of pleadings not agreed to by the opposite attorney, or included in the settled statement, though placed in the transcript, constitutes no part of the record.²

§ 5070. **Separate Appeals.**—When defendants take separate appeals, and sign distinct bonds, one transcript will suffice.³ Where one of the parties in an action appeals, and another party in the same action takes another and independent appeal, neither party, in the appellate court, can refer to the transcript in the other appeal for the facts, without a stipulation to that effect. Each appeal must be heard on its own record.⁴

§ 5071. **Statement.**—Where the transcript does not contain any statement or grounds of appeal, and no assignments of errors or brief are filed, the appeal will be dismissed.⁵ No portion of a statement can be omitted except on stipulation of the other party.⁶ Where a copy of an order certified by the clerk, sustaining a demurrer to a replication, together with the judgment roll, were filed, but there was no statement or bill of exceptions, the action of the court below on the demurrer could not be reviewed.⁷

§ 5072. **Stipulations.**—A stipulation signed by the attorneys of the parties, that “the foregoing transcript is correct,” does no more than take the place of the clerk’s certificate that the papers to which it is annexed are true copies. It does not preclude respondents from denying the correctness or sufficiency of the bill of exceptions.⁸ Where there is in the transcript a stipulation by the parties that “the plaintiff duly excepted” to the “charges and each part thereof,” it will be construed as a stipulation that the exceptions were sufficiently specified to render them available.¹⁰

§ 5073. **Undertaking.**—The appellant must show that the required undertaking on appeal has been given, either by inserting a copy of the undertaking in the transcript, or by stating

¹ *Marriner v. Smith*, 27 Cal. 649.

² *McQuade v. Whaley*, 29 Cal. 612.

³ *Baham v. Langfield*, 16 La. Ann. 156.

⁴ *Gates v. Walker*, 35 Cal. 289.

⁵ *Fowler v. Harbin*, 23 Cal. 631; *Hoadley v. Crow*, 22 Id. 265.

⁶ *Kimball v. Semple*, 31 Cal. 657.

⁷ *Bostwick v. McCorkle*, 22 Cal. 669. This case was overruled in *Smith v. Lawrence*, 38 Id. 28, where it is said that when a demurrer is sustained and the pleading demurred to is amended, the amendment op-

erates as an acquiescence in the decision on the demurrer; but that a refusal to amend can not be deemed an acquiescence in the decision; and neither a bill of exceptions nor statement is required where the record already presents the question of law and the decision of the court.

⁸ *Todd v. Winants*, 36 Cal. 129.

⁹ *Wetherbee v. Carroll*, 33 Cal. 549.

¹⁰ *Bowman v. Cudworth*, 31 Cal. 148.

in the stipulation of the attorneys or in the certificate of the clerk that the undertaking has been filed, and the time of filing the same.¹

§ 5074. **What Transcript should not Contain.**—Nothing is included in the record of a suit but the judgment roll.² Such parts of the judgment roll as are of no use for the purposes of the appeal should be omitted;³ or such matters as do not tend in some degree to illustrate the points made on appeal.⁴ A judgment in another case, which is not made part of the complaint or answer by averment, and was not one of the papers on the hearing of motion to grant or dissolve an injunction, though printed in the transcript, is no part of the record.⁵ When an appeal is taken on the judgment roll alone, and no statements made, a specification of grounds of error is not required to be inserted in the transcript. But when the court comes to examine the case, and no brief or statement of points and authorities is furnished on the part of the appellant to aid in the investigation, as required by the rules of the supreme court, the judgment will be affirmed without any examination of the case.⁶ A party can not incorporate in his transcript *ex parte* affidavits impeaching the statement, and after the final submission of the case bring the question before the supreme court for the first time in his brief.⁷

§ 5075. **Hearing on Appeal.**—After the record is fully made up and printed, and certified to by the county clerk of the proper county, or by the attorneys, it is called the transcript; and upon a deposit of fifteen dollars with the clerk of the supreme court, it is filed, and the case goes regularly on the calendar of that court, and is called in its order at the next term thereafter. Generally the causes in the supreme court are submitted on briefs; and it is deemed the better practice to do so unless the case involve some new or important principle, and even then an oral argument, however able or convincing, is necessarily forgotten before the case is taken up to be decided by the court, as months often elapse before it can be reached in its order. To understand the practice in the supreme court of California, as well as of the highest courts in any of the other states, a full knowledge of the rules of such courts must be acquired. This is especially important in the practice in the United States district, circuit, and supreme courts.

¹ Bryan v. Berry, 8 Cal. 130;
Wakeman v. Coleman, 28 Id. 58.

² Sharp v. Daugney, 33 Cal. 505.

³ Solomon v. Reese, 34 Cal. 28.

⁴ Estate of Boyd, 25 Cal. 511.

⁵ Sanchez v. Carriaga, 31 Cal. 170.

⁶ Hutton v. Reed, 25 Cal. 487.

⁷ Wormouth v. Gardner, 35 Cal. 227.

Where no briefs are filed within the time specified, when the cause is submitted on briefs to be filed, and the transcript contains no assignment of error, judgment will be affirmed.¹ If the appellant insists, in his brief, that the respondent must recover the whole amount sued for or nothing, the court will not decide whether the judgment was entered for a proper sum.² While the uncontradicted statements of counsel in his brief can not be taken as part of the record, still they may be referred to as tending to show that the inference drawn from a record is not unfounded.³ Points upon which appellant relies should be made in his opening brief.⁴ The points of counsel should be consistent with each other. Counsel can not claim there was a bill of sale to the opposite party for the purpose of excluding evidence of a verbal sale, and then insist that the bill of sale was void.⁵

§ 5076. **Errors in the Record, how Amended.**—Errors in dates, in copies of documents, in the description of premises taken for conveyances, and the like, can be corrected by a resettlement; and upon proper showing, made before argument, the supreme court may send the record back to the court below for that purpose. So, where the errors are admitted.⁶ And irrelevant portions of the case may be stricken out, or matter improperly inserted.⁷ But the supreme court can not amend a complaint so as to make it correspond with the verdict.⁸ Motion for amendment after return filed should be made to the court of appeals in the first instance.⁹ But a mere clerical error in a judgment, not affecting the appellant, can be corrected, and is not ground for reversal.¹⁰ If no motion is made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost.¹¹ The appellate court may order a document to be inserted in or stricken from the transcript, in order to perfect it, but it can not amend the document itself.¹²

§ 5077. **Argument of Counsel.**—No more than two counsel on a side will be heard upon the argument, except in

¹ Hutton v. Reed, 25 Cal. 488; Holm v. Roach, Id. 37; Edmondson v. Alameda Co., 24 Id. 349; Hickinbotham v. Monroe, 28 Id. 489. As to the time of filing briefs and the practice thereon, consult Cal. Sup. Court rule 2.

² Moore v. Murdock, 26 Cal. 514.

³ Hood v. Hamilton, 33 Cal. 698.

⁴ Hihn v. Courtis, 31 Cal. 398; Kelly v. McCormick, 28 N. Y. 318.

⁵ Patterson v. Keystone Min. Co., 30 Cal. 360.

⁶ People v. Romero, 18 Cal. 90.

⁷ Smith v. Grant, 15 N. Y. 590; Brown v. Saratoga R. R., 18 Id. 495.

⁸ Hooper v. Wells, 27 Cal. 11.

⁹ Adams v. Bush (No. 3), 2 Abb. Pr., N. S., 118.

¹⁰ Anderson v. Parker, 6 Cal. 197.

¹¹ Tryon v. Sutton, 13 Cal. 490.

¹² Bonds v. Hickman, 29 Cal. 460.

peculiar and important cases.¹ The counsel for the appellant shall be entitled to open and close the argument.² The appellant is confined in his argument to the objections urged in the court below.³ The respondent may suggest any ground to show that the ruling of the court below was right, whether the grounds suggested were advanced in the court below or not.⁴ Or he may insist on a point properly presented, although it was not urged in the trial of the cause.⁵ When counsel assume a certain principle advanced as correct law, and the court decides the case upon this assumption, without discussing its correctness, the opinion is not authority that such assumption is correct law.⁶

§ 5078. **Objections to the Transcript.**—Exceptions or objections to the transcript or statement, the bond or undertaking on appeal, the notice of appeal or its service, or any technical objection or exception to the record, affecting the right of the appellant to be heard on the points of error assigned, must be taken and noted in the printed points of respondent, required to be filed and served under the rules of the supreme court.⁷ The objection that it does not appear in the transcript when the statement or motion for new trial was filed in the court below must be made in the supreme court, before a submission of the case on the merits, or it will be deemed waived.⁸ If a case is submitted on its merits by consent of counsel, the submission, even if made before the day the case is set for argument, is a waiver of technical objections to the transcript.⁹ If the transcript can not be made out, by reason of the loss of a portion of the records of the case, it is the duty of the appellant to move the court below, at the earliest possible time, to supply the lost papers by some means under its control;¹⁰ as by copies from the original.¹¹ That the transcript of a record in a case on appeal is incomplete can not be shown by certificate of the clerk.¹²

¹ Cal. Sup. Ct. rule 18.

² Cal. Sup. Ct. rule 18; *Benham v. Rowe*, 2 Cal. 387.

³ *Clarke v. Huber*, 25 Cal. 593; *Edgerton v. Thomas*, 5 Seld. 42; *Belknap v. Seeley*, 4 Kern. 143; *Durgin v. Ireland*, Id. 322; *Codd v. Rathbone*, 19 N. Y. 37; *Savage v. Cook*, 17 Abb. Pr. 403; *Stewart v. Smith*, 14 Id. 75.

⁴ *Clarke v. Huber*, 20 Cal. 196.

⁵ *Kidd v. Teeple*, 22 Cal. 255.

⁶ *Donner v. Palmer*, 31 Cal. 500.

⁷ Cal. Sup. Ct. rule 13. So of the objection that it does not contain all that is required by section 346 of the California practice act (which corresponds to sections 950 to 954 of the code of civil procedure: *Solomon v. Reese*, 34 Cal. 28.

⁸ *Ross v. Roadhouse*, 36 Cal. 580.

⁹ *St. John v. Kidd*, 26 Cal. 263.

¹⁰ *Buckman v. Whitney*, 24 Cal. 267.

¹¹ *Buckman v. Whitney*, 28 Id. 555.

¹² *The Grapeshot*, 7 Wall. 563.

In case of a stipulation of attorneys, that "the foregoing transcript is correct," the respondent's objections to the sufficiency of the transcript are not waived by his failing to take exception thereto, according to rule 13 of this court.¹ On an appeal from a judgment by default against a non-resident, an objection that the record does not contain the affidavit on which an attachment in the suit issued is not well taken.² If a part of the judgment appealed from is omitted in the record, the supreme court may require it to be supplied on the suggestion of the diminution of the record;³ or the appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking not shown by the transcript to have been filed.⁴ The fact that the record is erroneous can not be shown by an affidavit of the judge who tried the cause.⁵ It will require a strong showing to justify the court to permit additions to the transcript of matters before deliberately omitted.⁶ The supreme court has no authority to correct the records in the lower courts. Applications to correct errors in the records of district courts, if any exist, must be made in lower courts.⁷ Where there is a substantial defect in the appeal, the objection may be taken at any time before judgment.⁸ If the defect of jurisdiction appear on the transcript it can not be cured by amendment, as consent of parties will not confer jurisdiction in appeal.⁹ But when a case is brought up on appeal for the second time, it is too late to object that the court had not jurisdiction to try the first appeal.¹⁰

§ 5079. **Dismissal of Appeal.**—If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the transcript, though not filed within the time prescribed, be on file at the time the notice of motion is given, that fact shall be a sufficient answer to the motion.¹¹ An appeal will be dismissed in certain cases where documents offered in evidence below are not found

¹ Todd v. Winants, 36 Cal. 129.

² Dow v. Whitman, 36 Ala. 604.

³ McGarrahan v. Maxwell, 28 Cal. 75.

⁴ Wakeman v. Coleman, 28 Cal. 58.

⁵ Smith v. Brannan, 13 Cal. 107. As to the practice in correcting errors or defects in the transcript, see Cal. Sup. Ct. rule 12; see McGregor v. Comstock, 19 N. Y. 581.

⁶ Ketchum v. Crippen, 31 Cal. 305.

⁷ Boston v. Haynes, 31 Cal. 107.

⁸ Denedle, Ex'x, v. Archer, 8 Pet.

526; Owings v. Kincannon, 7 Id. 399; Wilson v. Life and Fire Ins. Co., 12 Id. 140.

⁹ Mordecai v. Lindsay, 19 How. U. S. 200; Montgomery v. Anderson, 21 Id. 386; Ballance v. Forsyth, Id. 359.

¹⁰ Washington Bridge Co. v. Stewart, 3 How. U. S. 413; Sizer v. Many, 16 Id. 98.

¹¹ Cal. Sup. Ct. rule 3. For proceedings on motion to dismiss, consult Id. 4.

in the record;¹ or for want of assignment of errors.² But if the order of dismissal is procured by any fraud or imposition practiced on the court or the opposite party, the supreme court will recall the *remittitur*, stay the proceedings, and assert its jurisdiction, even after the adjournment of the term.³ No appeal shall be dismissed for insufficiency of the undertaking thereon, provided that a good and sufficient undertaking, approved by a judge of the supreme court, be filed in the supreme court before the hearing, upon motion to dismiss the appeal.⁴ In case the filing of notice of appeal did not precede the filing of the undertaking the appeal will be dismissed, but usually without prejudice to a second appeal.⁵ So because the undertaking was not filed within five days after notice of appeal filed.⁶ Where the appellant's appeal has been imperfectly made or settled, it will be, on motion, dismissed;⁷ or where the appeal is defective for want of jurisdiction;⁸ or where the order or decree appealed from is unappealable;⁹ or where the appeal is brought too late, or prematurely;¹⁰ or where no regular case is presented.¹¹ Where an appeal originally good is lost by change in the law, it will be dismissed on motion;¹² or where an appeal is brought in bad faith, or in violation of a stipulation;¹³ or where, pending the appeal, the controversy had been settled;¹⁴ or where, by enforcement of a portion of the judgment, appellant had waived his right to appeal;¹⁵ or where appellant has no right to appeal at all.¹⁶ But that appellant has no interest in the subject-matter

¹ Hall v. Beggs, 17 La. Ann. 130.

² Brooks v. Townsend, 4 Cal. 286.

³ Rowland v. Kreyenhagen, 24 Cal. 52; Martinez v. Galardo, 5 Id. 155.

⁴ Cal. Code C. P., sec. 954.

⁵ Carpentier v. Williamson, 24 Cal. 609; Dooling v. Moore, 19 Id. 81.

⁶ Gordon v. Wansey, 19 Cal. 82.

⁷ Livingston v. Radcliff, 2 Comst. 189; Sturgis v. Merry, Id. 189; King v. Dennis, Id. 189; Colie v. Brown, 1 N. Y. Code R. 416; Hunt v. Bloomer, 3 Kern. 341; Johnson v. Whitlock, Id. 344; Zabriskie v. Smith, 1 Id. 480.

⁸ Pugsley v. Kesselbergh, 6 Seld. 420; Wiggins v. Tallmadge, 7 How. Pr. 404; Lalliette v. Van Keuren, Id. 409.

⁹ Smith v. White, 23 N. Y. 572; Moore v. Westervelt, 1 N. Y. Code R. 415; Waite v. Van Allen, 22 N. Y. 319; Genin v. Tompson, 1 N. Y. Code R. 415; Ely v. Holton, 15 N. Y. 595; McAllister v. Albion Plank R. Co., 6 Seld. 353; Matter of Canal and Walker Streets, 2 Kern. 406; N. Y. Cent. R.

R. Co. v. Marvin, 1 Id. 276; Adams v. Fox, 27 N. Y. 640; Wiggins v. Tallmadge, 7 How. Pr. 404; Lahens v. Fielden, 15 Abb. Pr. 177.

¹⁰ Bank of Geneva v. Hotchkiss, 5 How. Pr. 478; Wells v. Danforth, 7 Id. 197; Woolen Mfg. Co. v. Townsend, 1 N. Y. Code R. 415; McMahon v. Harrison, 5 How. Pr. 360; Mills v. Shult, 2 E. D. Smith, 139.

¹¹ Westcott v. Thompson, 16 N. Y. 613; Hunt v. Bloomer, 13 Id. 341; Johnson v. Whitlock, Id. 344; Otis v. Spencer; Ingersoll v. Bostwick, 22 Id. 425.

¹² Gale v. Wells, 7 How. Pr. 191; Porter v. Jones, Id. 192.

¹³ Townsend v. Masterson Stone Dressing Co., 15 N. Y. 587.

¹⁴ Shank v. Shoemaker, 18 N. Y. 489; Smith v. Hart, 11 How. Pr. 203.

¹⁵ Bennett v. Van Syckel, 18 N. Y. 481.

¹⁶ Matter of Bristol, 16 Abb. Pr. 397.

of the suit is no ground for dismissal, even on a second appeal after judgment reversed.¹

In case of a second appeal, where the costs of the first appeal have not been paid, appeal will be stayed until the costs are paid.² Where the appellant does not furnish the papers necessary to inform the court of the nature of the appeal, the cause will be dismissed.³ Where appellant failed to file a transcript of the record showing that an appeal has been perfected, and respondents filed an affidavit that the appeal was taken for delay, the appeal was dismissed, with ten per cent damages.⁴ On an appeal from an order denying a new trial, appellant failing to furnish supreme court with a copy of the papers used on hearing the motion, appeal will be dismissed on motion.⁵ On motion to dismiss an appeal, on the ground that an undertaking on appeal is not shown in the transcript, appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking to the appellate court.⁶ Where the undertaking is sufficient to render the appeal effectual, but is not sufficient to operate as a stay, respondent may move for leave to proceed in the judgment, but not to dismiss the appeal.⁷ Where an appeal has been dismissed for want of a proper bond, and no final judgment rendered, a second appeal can be taken at any time within the period allowed by law.⁸ A motion to dismiss an appeal, on the ground that the transcript was not filed within the time required by the California supreme court rules, is too late after the case has been submitted.⁹ A dismissal of an appeal, from failure to file the record within the time required, is not an affirmance of the judgment.¹⁰ If the appellant neglects to file a brief within the time fixed, and the transcript contains no assignment of errors, except the general one that the order or judgment appealed from is not warranted by the evidence, the appeal, on motion, will be dismissed.¹¹ A defendant who appeared separately, and was not served with notice of appeal, or made a party to any proceedings subsequent to the judgment,

¹ Ricketson v. Compton, 23 Cal. 636.

² Dresser v. Brooks, 5 How. Pr. 75.

³ Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50.

⁴ Buckley v. Stebbins, 2 Cal. 149; fifteen per cent awarded in De Witt v. Porter, 13 Id. 171; twenty per cent in Nickerson v. Cal. Stage Co., 10 Id. 520; twenty-five per cent in McKeon v. Millard, 47 Id. 583.

⁵ Bodley v. Ferguson, 25 Cal. 584;

see also People v. Baker, 39 Id. 686.

⁶ Wakeman v. Coleman, 28 Cal. 58.

⁷ Dobbins v. Dollarhide, 15 Cal. 374.

⁸ Martinez v. Gallardo, 5 Cal. 155; Columbet v. Pacheco, 46 Id. 650.

⁹ Cook v. Klink, 8 Cal. 347.

¹⁰ United States v. Gomez, 23 How. U. S. 326.

¹¹ Williams v. Hall, 24 Cal. 156.

can not move to dismiss an appeal taken by another defendant.¹ An appeal will be dismissed if a copy of the notice of appeal is served before the day on which the original is filed.²

Mere delay is no ground for dismissal on appeal,³ nor that an appeal is sham and frivolous.⁴ Appeal will not be dismissed for clerical errors in the record,⁵ nor because the security was not sufficient to entitle the party to a *supersedeas*;⁶ but if the appellant has become possessed of all the appellee's interest, appeal will be dismissed.⁷ A motion to dismiss an appeal will not be entertained, even upon the ground that the appeal is frivolous, until after the time for filing the transcript has expired.⁸ On an appeal from a judgment and an order denying a new trial, the undertaking recited the judgment, but no mention was made of the order. The appeal from the order was dismissed for want of an undertaking, and the appeal from the judgment was dismissed because not taken within one year.⁹ Where the record showed that no appeal had been taken by reason of failure to serve notice of appeal in time, a motion to dismiss the appeal will be denied.¹⁰

§ 5080. **Dismissal, Effect of.**—Dismissal for want of prosecution operates as an affirmance of the judgment, within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term,¹¹ or where the dismissal is on the merits.¹² Where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like, it is not a bar.¹³ It has been held that after the dismissal of an appeal the appellate court loses all jurisdiction in the case. It stands in the same situation it did before the appeal was prayed.¹⁴

§ 5081. **Reinstatement.**—When an appeal has been dismissed, the appellate court may, upon good cause shown, reinstate it upon motion.¹⁵ But if dismissed for want of jurisdiction as to amount in controversy, affidavits of its value come too

¹ *Blanc v. Rodgers*, 47 Cal. 606.

² *Buffendean v. Edmondson*, 24 Cal. 94. But see Cal. Code C. P., sec. 940.

³ *Dey v. Walton*, 2 Hill, 403.

⁴ *Ricketson v. Compton*, 23 Cal. 636; *Dey v. Walton*, 2 Hill, 403; *Rogers v. Hoosack*, 5 Id. 521.

⁵ *Adams v. Law*, 16 How. U. S. 144.

⁶ *Hudgins v. Kipp*, 18 How. U. S. 530; *Anson v. Blue Ridge R. R. Co.*, 23 Id. 1.

⁷ *Cleveland v. Chamberlain*, 1 Black, 419.

⁸ *Foscalina v. Doyle*, 48 Cal. 151.

⁹ *Bornheimer v. Baldwin*, 38 Cal. 671.

¹⁰ *Harlan v. Pratt*, 50 Cal. 94.

¹¹ *Karth v. Light*, 15 Cal. 324; *Rowland v. Kreyenhagen*, 24 Id. 52; *Chamberlin v. Reed*, 16 Id. 207.

¹² *Karth v. Light*, 15 Cal. 324.

¹³ Id.

¹⁴ *Maxwell v. Williams*, Hempst. 172; see Cal. Code C. P., sec. 955.

¹⁵ *The Palmyra*, 12 Wheat. 9; *Bank of U. S. v. Swan*, 3 Pet. 68.

late.¹ If from any excusable cause appellant has been prevented from prosecuting his appeal, and the same has been dismissed, his remedy is by motion to reinstate the case. And if from like cause he has been prevented from making his motion at the same term in which his appeal was dismissed, he may, upon proper showing, and after due notice to the respondent, make the motion at a subsequent term.² Such motion must be supported by affidavit that, in the opinion of counsel, there are substantial errors in the record.³ A case will be reinstated where fraud or imposition has been used in procuring its dismissal.⁴

§ 5082. **What will be Reviewed.**—In general, all material errors committed by the court below in its orders, rulings, decisions, and judgments will be reviewed in the supreme court on appeal, when the same are properly made to appear by the record.

§ 5083. **Errors in Judgment Roll.**—The supreme court will take notice of errors appearing in the judgment roll, even if not named in the specification of errors in the statement;⁵ but not minor errors, if on the whole record the decree be right.⁶ On an appeal from the judgment, where there is no statement, the appellate court will only consider matters appearing in the judgment roll.⁷

§ 5084. **Errors in Law.**—Errors in law will be reviewed in the appellate court, although a new trial was not asked.⁸ If no errors are assigned in the record, the appellate court will only review the judgment roll.⁹ They may be reviewed on a bill of exceptions.¹⁰ It has been held that the entire absence of a written decision of the judge trying an issue of fact without a jury may be an error reviewable on appeal. But if the appellant relies on the point that the court below erred in failing to find the facts, he must make it appear by the record, by bill of exceptions, or some other appropriate method, that findings of fact were not waived; otherwise the intendments will support the judgment.¹² The failure of the judge to specify in his decision the relief granted or the determination of the action is an error

¹ *Richmond v. City of Milwaukee*, 21 How. U. S. 391.

² *Haight v. Gay*, 8 Cal. 300.

³ *Hagar v. Mead*, 25 Cal. 598; *Dorland v. McGlynn*, 45 Id. 18; see also *Welch v. Kenney*, 47 Id. 414, and rules 3 and 4 of Cal. supreme court.

⁴ *Rowland v. Kreyenhagen*, 24 Cal. 52.

⁵ *Sharp v. Daugney*, 33 Cal. 505.

⁶ *Goode v. Smith*, 13 Cal. 81.

⁷ *Harper v. Minor*, 27 Cal. 107.

⁸ *Brown v. Tolles*, 7 Cal. 399.

⁹ *Millard v. Hathaway et al.*, 27 Cal. 119, 137.

¹⁰ *McCartney v. Fitz Henry*, 16 Cal. 184; *Collier v. Corbett*, 15 Id. 183; *Walls v. Preston*, 25 Id. 59.

¹¹ *Russel v. Armador*, 2 Cal. 305; *Ragan v. McCoy*, 26 Mo. 166; *Sutter v. Streit*, 21 Id. 157.

¹² *Mulcahy v. Glazier*, 51 Cal. 626.

reviewable on appeal from the judgment.¹ When a motion is granted in the court below, entirely upon alleged errors of law, the supreme court will review the action of the court below as in other cases.²

§ 5085. **Errors in the Rulings.**—The errors in the rulings of the court in the progress of the trial are subject to review, when the exceptions are preserved by bill of exceptions, or brought up in a statement on appeal.³ Where the questions in a case arise upon motion for nonsuit, and upon the action of the court in giving and refusing instructions, a motion for new trial is unnecessary.⁴

§ 5086. **Evidence and Facts.**—The supreme court will look at the evidence so far only as to see the relevancy of the exceptions taken during the trial.⁵ On appeal from an order granting or refusing a new trial, the supreme court always reviews the evidence, if the point is made that the verdict is contrary to the evidence.⁶ But in an equity case submitted by the court to a jury, the appellate court will not review the testimony, if any proof sustains the verdict and judgment.⁷ The court will review the facts of a case only to see if there is a substantial conflict of evidence.⁸ If, however, the evidence against the verdict is so overwhelming as to justify the inference that it was rendered under the influence of passion or prejudice, or bias of some kind, a new trial should be granted, even though there is some conflict.⁹ But on appeal from orders determining the action and preventing a final judgment, questions of fact are reviewable.¹⁰ But the supreme court can not examine the evidence for the purpose of finding a fact.¹¹

§ 5087. **From Final Judgment.**—On an appeal from a final judgment, the supreme court may review such intermediate non-

¹ Chamberlain v. Dempsey, 14 Abb. Pr. 241.

² O'Brien v. Brady, 23 Cal. 243.

³ Carpentier v. Williamson, 25 Cal. 154.

⁴ Sullivan v. Cary, 17 Cal. 80; Darst v. Rush, 14 Id. 81.

⁵ Carpentier v. Williamson, 25 Cal. 154.

⁶ Rice v. Cunningham, 29 Cal. 492.

⁷ Pfeiffer v. Riehn, 13 Cal. 643.

⁸ Rice v. Cunningham, 29 Cal. 492; Crook v. Forsyth, 30 Id. 662; Wilkinson v. Parrott, 32 Id. 102; Hardenbergh v. Bacon, 33 Id. 356; Hall v. Bark Emily Banning, Id. 522; Wendt

v. Ross, Id. 650; consult also White v. Lyons, 42 Id. 283; Hellman v. Howard, 44 Id. 104; Crosett v. Wheelan, Id. 203; Higuera v. Bernal, 46 Id. 581; Thompson v. Toland, 48 Id. 114; Sperry v. Spaulding, 49 Id. 253; Noonan v. Hood, Id. 294; Trenor v. C. P. R. R. Co., 50 Id. 222; Jones v. Shay, Id. 509.

⁹ Cooper v. Pena, 21 Cal. 403; Dickey v. Davis, 39 Id. 569; Mason v. Austin, 46 Id. 641; Sherman v. Mitchell, Id. 579.

¹⁰ Bates v. Voorhies, 20 N. Y. 525.

¹¹ Ellis v. Jeans, 26 Cal. 278; Carpentier v. Gardiner, 29 Id. 160.

appealable orders as involve the merits.¹ It may review an order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference.² But an order denying a new trial can not be reviewed on an appeal from a final judgment.³ If on the rendition of a final judgment the court also grants a perpetual injunction, and an appeal is taken from the whole judgment, the injunction is included in the appeal.⁴ An order adding a new party plaintiff may be reviewed on appeal from the judgment;⁵ or an order for judgment on demurrer.⁶ An order dismissing an attachment if the appeal is also taken from such order.⁷

§ 5088. **Orders.**—An enumeration of appealable orders are given in the code.⁸ All other orders can be reviewed only on appeal from the judgment, and then only when there has been an exception properly made and preserved in the record. An appeal may, however, be taken at the same time from a final judgment and from an appealable order, but each must distinctly appear in the motion of appeal and the undertaking.

§ 5089. **Practice.**—A party who appears and contests a motion can not on appeal object that he had no notice of motion.⁹ The objection that the statement and notice do not specify the grounds of motion for new trial should be taken in the court below, and if overruled will be reviewed in the supreme court.¹⁰ Where a party moves for a nonsuit upon a specific ground, he can not on appeal assume a different position;¹¹ or that the court below refused a nonsuit, because of no demand made before suit unless that ground was taken below;¹² or an objection to an order overruling a motion to set aside the judgment and quash the execution.¹³ The failure of a party to object to the rendition of a judgment upon a report is no waiver of his right to have his exceptions to the report reviewed.¹⁴ No objection or exception will be examined, except such as are included in the appellant's statement of points on which he relies.¹⁵

¹ Cal. Code C. P., sec. 956; *Hihn v. Peck*, 30 Cal. 280.

² *Id.*

³ *Id.*

⁴ *McGarrahan v. Maxwell*, 28 Cal. 75.

⁵ *Davis v. Mayor of N. Y.*, 14 N. Y. 526.

⁶ *Hollister Bank of Buffalo v. Vail*, 15 N. Y. 593; *Paddock v. Springfield Fire and Mar. Ins. Co.*, 2 Kern. 591; *Ford v. Davis*, 3 Abb. Pr. 385.

⁷ *Williams v. Glasgow*, 1 Nev. 533.

⁸ See Cal. Code C. P., sec. 939, subd. 3.

⁹ *Reynolds v. Harris*, 14 Cal. 667.

¹⁰ *Brady v. O'Brien*, 23 Cal. 244.

¹¹ *Mateer v. Brown*, 1 Cal. 221.

¹² *Baker v. Joseph*, 16 Cal. 173.

¹³ *Smith v. Curtis*, 7 Cal. 584.

¹⁴ *Headley v. Reed*, 2 Cal. 322.

¹⁵ *Moore v. Murdock*, 26 Cal. 514.

§ 5090. **Statute of Limitations.**—The question of the statute of limitations can not be raised, even though pleaded, unless raised in some form on the trial below.¹

§ 5091. **What will not be Reviewed.**—The appellate court can not review any portions of an adjudication not actually appealed from,² nor which is not included in the printed case.³ Nothing can be taken into consideration that does not appear upon the return.⁴ As a general rule, an objection which might have been obviated in the court below will not be reviewed on appeal.⁵

§ 5092. **Costs.**—An error of court in refusing to allow costs can not be reviewed on an appeal from an order denying a new trial.⁶ On appeal from a judgment, an error which might occur in sustaining a motion, after the appeal was perfected, to strike out the cost-bill, can not be reviewed.⁷

§ 5093. **Evidence.**—As a rule, the supreme court acts upon the case precisely as it was presented to the court below, and can not receive or notice new evidence. In New York, it is said to be a well-established rule that permits record evidence, imperfectly proved on the trial, to be exhibited on the argument in the appellate court, since if all that was defective was then supplied, it would be idle to send the cause back for a new trial upon an exception no longer tenable.⁸ But the supreme court will not review the facts of the case unless a new trial was asked for in the court below, and this whether the case be in equity or at law.⁹ If the case, however, be tried on an agreed statement of facts, which forms part of the judgment roll, the question

¹ McDonald v. Bear River Co., 13 Cal. 238.

² Robertson v. Bullions, 1 Kern. 243; Kelsey v. Western, 2 Comst. 500; Bell v. Holford, 1 Duer, 58.

³ Titus v. Orvis, 16 N. Y. 617; Otis v. Spencer, Id. 610.

⁴ Spence v. Beck, 1 Hilt. 276; Kilpatrick v. Carr, 3 Abb. Pr. 117; Ranson v. Grow, 4 E. D. Smith, 18; Trust v. Delaplaine, 3 Id. 219; Prentice v. Zane, 8 How. U. S. 470.

⁵ Gordon v. Clark, 22 Cal. 533; Stewart v. Smith, 14 Abb. Pr. 75; Fowler v. Clearwater, 35 Barb. 143; Judd v. O'Brien, 21 N. Y. 186; Jobbitt v. Goundry, 29 Barb. 509; N. Y. Cent. Ins. Co. v. National Prot. Ins. Co., 14 N. Y. 85; Barnes v. Perine, 12 Id. 18; Van Deusen v. Young, 29 Barb. 9; Bumstead v. Dividend Ins. Co., 12 N. Y. 81; Carter v. Hunt, 40 Barb. 89,

93; Forward v. Harris, 30 Id. 338; Hunt v. Hoboken Land Co., 1 Hilt. 161; Fenn v. Timpson, 4 E. D. Smith, 276; Barlow v. Scott, 24 N. Y. 40; Greason v. Ketaltas, 17 Id. 491; Belknap v. Sealey, 14 Id. 143; Sheldon v. Wood, 2 Bosw. 267. So errors in favor of an appellant can not be reviewed: Weisser v. Dennison, 10 N. Y. 68; Glassner v. Wheaton, 2 E. D. Smith, 352; Beach v. Raymond, Id. 496; Rooney v. Second Av. R. R., 18 Id. 368; Robbins v. Codman, 4 Id. 315; Fake v. Whipple, 39 Barb. 339.

⁶ Stevenson v. Smith, 28 Cal. 102.

⁷ Howard v. Richard, 2 Nev. 128.

⁸ Jarvis v. Sewall, 40 Barb. 455; citing Burt v. Place, 4 Wend. 591; Ritchie v. Putnam, 13 Id. 524; Dresser v. Brooks, 3 Barb. 429.

⁹ Reed v. Bernal, 40 Cal. 630, overruling Treadwell v. Davis, 34 Id. 601.

may be raised, on an appeal from the judgment, whether the judgment be authorized by the agreed facts.¹ It would seem, however, that under the code the question whether the evidence is sufficient to sustain the findings, in a case tried by the court, may be made, on appeal from the judgment, where the testimony is presented by bill of exceptions.² The safer practice is, however, to move for a new trial, as the point has not been directly adjudicated. Where the motion for a new trial does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict.³

§ 5094. **Facts, Questions of.**—In New York, on an appeal to the general term of the supreme court, or of a superior city court from a final judgment rendered in the same court, the facts as well as law may be reviewed where the judgment was rendered upon a trial by the court below without a jury, or by a referee; but when the judgment was rendered upon the verdict of a jury, the appeal is upon questions of law alone.⁴ On an appeal from an order granting or refusing a new trial, the facts may be reviewed, except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, an appeal can not be taken from the order granting or refusing a new trial upon the merits.⁵ But an order of the general term granting a new trial upon questions of fact, in a case tried by a jury, is not appealable to the court of appeals.⁶ Where a new trial is granted in an action tried by a jury, and the record shows that questions of fact were properly before the general court for decision, and that the order for a new trial may or could have been based thereon, the court of appeals will not review it for the purpose of reversal.⁷ In cases tried by the court or referee, the court of appeals will look into the evidence only in exceptional cases, made so by the statute.⁸

§ 5095. **Findings of Fact.**—Alleged errors in findings of fact will not be considered where the findings themselves are immaterial to the decision;⁹ neither the opinions of the court

¹ Reed v. Bernal, 40 Cal. 630, overruling Treadwell v. Davis, 34 Id. 601. As to the necessity of a motion for a new trial, see also Foote v. Richmond, 42 Cal. 439; Rycraft v. Rycraft, Id. 444; Stockton v. Creaner, 45 Id. 247.

² See Jones v. Shay, 50 Cal. 508; Thompson v. Hancock, 51 Id. 110; Bonner v. Quackenbush, Id. 180; Christie v. Christie, Cal. Sup. Ct., April, 1878, 1 P. C. L. J. 207.

³ Myers v. Casey, 14 Cal. 542.

⁴ N. Y. Code, sec. 1346.

⁵ Id., sec. 1347.

⁶ Wright v. Hunter, 46 N. Y. 409; Downing v. Kelly, 48 Id. 433; Strong v. B. & A. R. R. Co., 58 Id. 56.

⁷ Downing v. Kelly, 48 N. Y. 433; Wright v. Hunter, 46 Id. 409.

⁸ Field v. Munson, 47 N. Y. 221.

⁹ Klockenbaum v. Pierson, 22 Cal. 160.

nor the evidence from any part of the findings of fact, although incorporated therein.¹ The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the court on its own motion, become established facts in the case, and can not be questioned in the supreme court for the first time.² A judgment will not be reversed on the findings alone, unless they show affirmatively that such judgment could not have been properly rendered.³

§ 5096. **Findings, Omission of.**—The omission of a judge or referee trying a cause to find upon a particular question of fact can not be reviewed on an appeal from the judgment. The remedy is to have it referred back for correction.⁴ Where the court fails to find the facts which the evidence establishes, a motion for a new trial—that is, to set aside and modify the findings—having been made, the supreme court will look into the evidence for such facts, and is not concluded by the findings of the court below.⁵ The supreme court is not authorized to presume the finding of a fact not within the issue;⁶ nor look beyond the findings contained in the case in order to draw inferences of fact bearing on the appeal;⁷ except for the purpose of giving a construction to an ambiguous finding.⁸

§ 5097. **Instructions.**—The appellate court will not pass upon the completeness of the instructions given by the court to the jury, if the plaintiff is not entitled to recover upon his own showing.⁹ Though the instructions may not be technically correct, the supreme court will not interfere if the question upon which the case turns was fairly put before the jury.¹⁰

§ 5098. **Irregularities.**—If the decision or verdict is regular, mere irregularities on the trial will not be reviewed;¹¹ nor the entry of judgment in disregard of an order staying proceedings.¹² But where it had been entered in a grossly irregular manner, and the court below refused to correct it, the error would be reviewed.¹³

¹ James v. Williams, 31 Cal. 211.

² Duff v. Fisher, 15 Cal. 375.

³ Semple v. Cook, 50 Cal. 26.

⁴ People v. Albright, 14 Abb. Pr. 305; Heroy v. Kerr, 8 Bosw. 194; Platt v. Thorne, Id. 574; Sharp v. Wright, 35 Barb. 236; Ingraham v. Gilbert, 20 Id. 151.

⁵ Riley v. Heisch, 18 Cal. 198.

⁶ Bernal v. Gleim, 33 Cal. 668; Gifford v. Carvill, 29 Id. 589.

⁷ Stewart v. Smith, 14 Abb. Pr. 75.

⁸ Spencer v. Ballou, 18 N. Y. 327;

Carman v. Pultz, 21 Id. 547; Terry v. Wheeler, 25 Id. 520.

⁹ Enright v. S. F. & S. J. R. R. Co., 33 Cal. 230.

¹⁰ Smith v. Harper, 5 Cal. 330.

¹¹ As to form of judgment as entered, see Ingersoll v. Bostwick, 22 N. Y. 425; Johnson v. Carnley, 10 Id. 570; Witherhead v. Allen, 28 Barb. 661; Mayor of N. Y. v. Lyons, 24 How. Pr. 280.

¹² Elwell v. Dodge, 33 Barb. 336.

¹³ Johnson v. Farrell, 10 Abb. Pr. 384.

If a judgment is just in the main, mere technical irregularities of form will be disregarded.¹

§ 5099. **Matter in Discretion of Court.**—The refusal of a referee to adjourn a hearing, where it was a matter resting in his discretion, will not be reviewed on appeal;² nor denial of motion to stay trial till the decision in another cause;³ or that a judgment for defendant is improper, the answer containing no prayer for relief.⁴ The appellate court will not inquire into the reasons which induce the judge to sign the bill after the statutory period.⁵ Nothing but an abuse of discretion on his part, or a great preponderance of evidence against the verdict, will warrant an appellate court in interfering.⁶

§ 5100. **Order by Consent.**—The supreme court will not hear any objections to an order entered by consent of parties.⁷ A court of appellate jurisdiction can not reverse a judgment produced by the voluntary act of a party.⁸ And no decision on any point rendered at the suggestion of the appellant can be reviewed.⁹ A judgment entered upon stipulation can not be reviewed, even though both parties consent.¹⁰

§ 5101. **Pleadings.**—A judgment can not be reviewed on the ground of a defective complaint, or that the judgment is not warranted by the findings, on an appeal from an order denying a new trial.¹¹

§ 5102. **Questions.**—Questions not directly involved, and those unnecessary to a judgment of affirmance or reversal, will not be considered;¹² or questions not presented in good faith;¹³ or questions not arising in the due course of litigation.¹⁴ Questions of discretion of the judge can not be reviewed in the supreme court, except in cases of gross abuse, to the injury of the party;¹⁵ or the refusal of the court or referee to allow a witness

¹ People v. McCauley, 1 Cal. 379; Webster v. King, 33 Id. 348.

² See Carpenter v. Haynes, 1 N. Y. Code R. 414.

³ James v. Chalmers, 6 N. Y. 209.

⁴ Towdy v. Ellis, 22 Cal. 650.

⁵ People v. Lee, 14 Cal. 510.

⁶ Gove v. Moses, 1 Wash. Ter. 13; Daws v. Glasgow, Burn. 8; Newby v. Territory v. Oregon, 1 Or. 163.

⁷ Meerholz v. Sessions, 9 Cal. 277.

⁸ Paul v. Armstrong, 1 Nev. 82.

⁹ Fairbanks v. Corlies, 3 E. D. Smith, 582; S. C., 1 Abb. Pr. 150; Orser v. Grossman, 4 E. D. Smith, 443.

¹⁰ Gridley v. Daggett, 6 How. Pr.

280; Townsend v. Masterson Stone Dressing Co., 15 N. Y. 587. So in special cases: McAllister v. Albion Plank Road Co., 6 Seld. 353; Matter of Canal and Walker Sts., 2 Kern. 406; N. Y. Cent. R. R. v. Marvin, 1 Id. 276; Commissioners of Gaines v. Albion Plank Road Co., 7 How. Pr. 301.

¹¹ Jenkins v. Frink, 30 Cal. 586.

¹² West v. Smith, 5 Cal. 96.

¹³ People v. Pratt, 30 Cal. 223.

¹⁴ Id.

¹⁵ Smith v. Billett, 15 Cal. 26; Smith v. Richmond, Id. 501; O'Brien v. Brady, 23 Id. 243.

to be recalled;¹ or the allowance of a leading question;² or granting or refusing leave to amend a pleading.³

§ 5103. **Rulings.**—Where a new trial was granted on one of several grounds, the order will not be reversed if it was in the discretion of the court to make it upon any of the grounds stated.⁴ But inconsequential rulings and decisions on which error is assigned will not be considered.⁵

§ 5104. **When Exception must be Taken.**—It is a general rule of practice, that no point arising on the pleadings or evidence, which has not been brought to the notice of the inferior courts, will be reviewed on appeal, and such point or objection must be presented by bill of exceptions or statement; and that the appellate court will examine the case only upon the errors assigned by the appellant, and not look into the exceptions taken by respondent, even if made by stipulation.⁶ Only errors committed against the appellant will be examined.⁷ But objections which could not possibly have been obviated, though not mentioned before, may be raised at any time.⁸ Such objection must go to the substance of the cause of action, and not to its technical form of statement.⁹ So objections to the jurisdiction of the court;¹⁰ or to absence of any cause of action in the complaint;¹¹ or where the complaint contains such defects as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged;¹² or where a bill in equity shows on its face that plaintiff is not entitled to relief, even though no demurrer be filed;¹³ or where objections to evidence, though not made in the court below, could not be under any circumstances there obviated.¹⁴

¹ Thomas v. Fleury, 26 N. Y. 26; Trimble v. Stilwell, 4 E. D. Smith, 512.

² Budlong v. Van Nostrand, 24 Barb. 25.

³ U. S. v. Gurney, 4 Cranch, 337; Marine Ins. Co. v. Young, 5 Id. 187; Barr v. Gratz, 4 Wheat. 220; Van Duzer v. Howe, 21 N. Y. 531; Hodges v. Tenn. Ins. Co., 8 Id. 416; Hunt v. Huds. Riv. Fi. Ins. Co., 2 Duer, 480; Van Ness v. Bush, 14 Abb. Pr. 33; St. John v. Northrup, 23 Barb. 25; Hendricks v. Decker, 35 Id. 298; Kissam v. Roberts, 6 Bosw. 154; Woodruff v. Hurson, 32 Barb. 557; Robbins v. Richardson, 2 Bosw. 248; Ford v. David, 1 Id. 569; Gould v. Rumsey, 21 How. Pr. 97; Wright v. Hollingsworth, 1 Pet. 165; White v. Wright, 22 How. U. S. 19; Eberly v. Moore, 24 Id. 147.

⁴ Oullahan v. Starbuck, 21 Cal. 413.

⁵ Paige v. O'Neal, 12 Cal. 483; Kisling v. Shaw, 33 Id. 425.

⁶ Jackson v. F. R. Water Co., 14 Cal. 18; Paul v. Magee, 18 Id. 699.

⁷ Seaward v. Malotte, 15 Cal. 304.

⁸ Beekman v. Frost, 18 Johns. 544; Palmer v. Lorillard, 16 Id. 348; Cole v. Blunt, 2 Bosw. 116; Sanford v. Granger, 12 Barb. 392; Pepper v. Haight, 20 Id. 429.

⁹ Mott v. Smith, 16 Cal. 533.

¹⁰ Id.; Valarino v. Thompson, 7 N. Y. 576.

¹¹ Cal. Code C. P., sec. 434; Russell v. Byron, 2 Cal. 86; Gregory v. Ford, 14 Id. 138; Barron v. Frink, 30 Id. 486; Himmelman v. Danos, 35 Id. 441; Cole v. Blunt, 2 Bosw. 116; Rayner v. Clark, 7 Barb. 581; Lounsbury v. Purdy, 18 N. Y. 515.

¹² Hentsch v. Porter, 10 Cal. 555.

¹³ White v. Fratt, 13 Cal. 521.

¹⁴ Mott v. Smith, 16 Cal. 533.

§ 5105. **Evidence.**—Objections to evidence must be entered of record below;¹ or objections that there was no proof of the absence of witnesses whose depositions were read.² Where a material fact was assumed in the court below, without any objection of the want of evidence thereof, such objection can not be raised upon appeal.³ Exceptions to the admissibility of a deed in evidence must be taken advantage of at *nisi prius*.⁴ Where parol testimony to vary the terms of a written agreement is offered, and received without objection, the objection that it was inadmissible can not be raised in the supreme court.⁵ If incompetent evidence is admitted and treated as competent, the question of its competency can not be raised in the appellate court.⁶ Where the objection to the admission of testimony in the trial is general, it can not be made special for the first time in the supreme court.⁷

§ 5106. **Findings.**—The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, can not be reviewed.⁸ So with objections to a master's report;⁹ or to the report of commissioners appointed to ascertain an amount due.¹⁰ If the court, in its finding of fact, fails to find an issue made in the pleadings, the defect must be excepted to in the court below;¹¹ so of the omission to find upon a particular question of fact.¹² The only question that can be raised in the supreme court upon the findings, if no exception is taken to them, is, Are they consistent with the judgment?¹³

§ 5107. **Instructions.**—Where instructions to the jury are not excepted to at the time they are given or refused, they can not be considered on appeal.¹⁴ So as to the objection that the court directed the jury to find specially as to a particular fact.¹⁵

¹ Potter v. Karney, 8 Cal. 574; Mott v. Smith, 16 Id. 535; Payne v. Treadwell, Id. 247; Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299.

² Lockhart v. Mackie, 2 Nev. 294.

³ Jencks v. Smith, 1 N. Y. 40; Paige v. Fazackerly, 36 Barb. 392; Munson v. Hegeman, 10 Id. 112; Willard v. Bridge, 4 Id. 361; Hunter v. Sandy Hill, 6 Hill, 410; Thurman v. Cameron, 24 Wend. 87; Oakley v. Van Horne, 21 Id. 305; Ford v. Monroe, 20 Id. 211; Beekman v. Bond, 19 Id. 444; Patterson v. Westervelt, 17 Id. 545; Jackson v. Roberts, 11 Id. 422.

⁴ Posten v. Rasette, 5 Cal. 467.

⁵ Tebbs v. Weatherwax, 23 Cal. 58.

⁶ Curia v. Packard, 29 Cal. 194.

⁷ People v. Glenn, 10 Cal. 32.

⁸ Duff v. Fisher, 15 Cal. 375.

⁹ Hudgins v. Kemp, 20 How. Pr. 45, 54; Kinsman v. Parkhurst, 18 Id. 289.

¹⁰ The Virgin, 8 Pet. 538.

¹¹ Merrill v. Chapman, 34 Cal. 251.

¹² Sharp v. Wright, 35 Barb. 236; Ingraham v. Gilbert, 20 Id. 151; People v. Albright, 14 Abb. Pr. 305; 23 How. Pr. 306; Heroy v. Kerr, 8 Bosw. 194; 21 How. Pr. 409; Hulce v. Sherman, 13 Id. 411; Platte v. Thorne, 8 Bosw. 574.

¹³ James v. Williams, 31 Cal. 211; Lucas v. San Francisco, 28 Id. 591.

¹⁴ Collier v. Corbett, 15 Cal. 186; Payne v. Treadwell, 16 Id. 247; Letter v. Putney, 7 Id. 423; St. John v. Kidd, 26 Id. 263.

¹⁵ People v. Chu Quong, 15 Cal. 332.

§ 5108. **Irregularity in Proceedings.**—The objection that the jury in the court below was not duly selected and summoned as required by law must be excepted to in the court below.¹ As to the improper allowance of interest on a running account, no objection being taken for that reason to the judgment or finding of the referee, the judgment will not be reversed.² Where no exceptions were taken to the reading of the statute law and decisions of the supreme court to the jury, there is no ground of error;³ or to the reading of a portion of answer which had been stricken out;⁴ or that an account presented to the supervisors of a county was not authenticated, as required by statute, can not be taken in the supreme court for the first time.⁵

§ 5109. **Parties.**—To be reviewable, objection must be taken to parties or the joinder of parties in the court below;⁶ or that certain parties could not intervene.⁷

§ 5110. **Pleadings.**—Exceptions must be taken in the court below to objections to the form of a complaint or answer;⁸ or that a supplemental complaint should have been filed;⁹ or that two counts in a complaint on an equitable action should not be tried by a jury;¹⁰ or an objection to the complaint which defeats only plaintiff's present right to recover;¹¹ or that the complaint is defective, because it is not alleged that plaintiff's claim was presented to the administrator for allowance.¹² If the plaintiff, on the trial, treats an allegation of the complaint as denied in the answer, he can not raise the point in the supreme court for the first time that such allegation is not denied.¹³ So in matters of defense not brought forward at the trial.¹⁴

¹ Spencer v. Doane, 23 Cal. 419.

² Whiting v. Clark, 17 Cal. 407.

³ People v. Galvin, 9 Cal. 115.

⁴ Morgan v. Hugg, 5 Cal. 409.

⁵ Randall v. Yuba Co., 14 Cal. 219.

⁶ Sands v. Pfeiffer, 10 Cal. 258; The Commander-in-chief, 1 Wall. 43; Livingston v. Woodworth, 15 How. U. S. 546.

⁷ McKenty v. Gladwin, 10 Cal. 227.

⁸ Sutter v. Cox, 6 Cal. 415; People v. Jones, 20 Id. 50; Peterson v. Horn-

blower, 33 Id. 266; King v. Davis, 34 Id. 100; Kubland v. Sedgwick, 17 Id. 123.

⁹ Van Maren v. Johnson, 15 Cal. 308.

¹⁰ Baker v. Joseph, 16 Cal. 173.

¹¹ Hentsch v. Porter, 10 Cal. 555.

¹² Peterson v. Hornblower, 33 Cal. 266.

¹³ Racouillat v. Rene, 32 Cal. 450.

¹⁴ Bell v. Bruen, 1 How. U. S. 169; Findlay v. Hinde, 1 Pet. 241.

CHAPTER IV.

PRINCIPLES OF DETERMINATION.

§ 5111. **In General.**—The question before an appellate court is, Was the judgment correct?—not the ground on which the judgment professed to proceed.¹ The supreme court may direct the court below to render the proper judgment.² And the court below has no authority to enter a different judgment from that directed.³ It can not revise its own judgments, but when proceedings founded on them are brought up for review, it will make such orders as are necessary to cause the judgment to be enforced.⁴ An erroneous judgment can not be corrected by bringing suit in the nature of a bill of review: the proper method is by appeal.⁵ The practice of giving the reason in writing for judgment is of modern origin. It is discretionary with the court whether it give an opinion upon pronouncing judgment, and if given, whether it be oral or in writing.⁶ Existing laws at the time the proceedings were had are to govern the decision on appeal.⁷ And this court is bound to decide according to the law of the whole case, and not upon particular points raised by counsel.⁸ In chancery cases, the supreme court has full power and jurisdiction, for the purposes of equity, to correct errors of the court below in whatever shape or by whatever party appeal is taken up.⁹ Errors which the court below can and will correct on motion should not be made the ground of an appeal;¹⁰ such as clerical and arithmetical errors,¹¹ or errors which might have been cured by amendment, or questions as to variance or regularity.¹² The general rule is, that if error intervenes the judgment must be reversed, and error imports injury to the party against whom it is committed, unless it affirmatively appear that no injury did or could occur to him thereby.¹³ But if during subsequent proceed-

¹ Davis v. Packard, 6 Pet. 41.

² Love v. Shartzer, 31 Cal. 487.

³ Argenti v. Sawyer, 32 Cal. 414; Meyer v. Kohn, 33 Id. 484.

⁴ Argenti v. San Francisco, 30 Cal. 458.

⁵ Savings and Loan Society v. Thompson, 34 Cal. 76.

⁶ Houston v. Williams, 13 Cal. 24.

⁷ Hancock v. Thorn, 46 Cal. 643; U. S. v. The Peggy, 1 Cranch, 103; Hartung v. People, 22 N. Y. 95.

⁸ Consult *post*, "Law of the Case," under "Remittitur;" Hubbard v. Sullivan, 18 Cal. 508.

⁹ Grayson v. Guild, 4 Cal. 122.

¹⁰ Bunburg v. Bolton, 1 Bro. P. C. 434.

¹¹ Rogers v. Hosack, 18 Wend. 319.

¹² N. Y. Central Ins. Co. v. National Protection Ins. Co., 4 Kern. 85; Bates v. Graham, 1 Id. 237; Lounsbury v. Purdy, 18 N. Y. 515; Ingersoll v. Bostwick, 22 Id. 425; Bennett v. Judson, 21 Id. 238; Cardell v. McNiel, Id. 341; Lake Ontario R. R. v. Marvine, 18 Id. 585; McCormick v. Pickering, 4 Id. 276.

¹³ Rice v. Heath, 39 Cal. 609; Sweeney v. Reilly, 42 Id. 402.

ings the foundation of the error is overthrown, and facts are shown to support the rulings of the court, the error is cured.¹ Or where error in course of the trial was fully corrected, or the exception waived.² When a finding is sought to be impeached, the appellate court will look into the evidence for the purpose of supporting it.³ And all the findings in an action must be construed together.⁴ And a finding of fact may be construed by a finding of law.⁵ The appellate court must look into the record to see if there is any foundation for a judgment appealed from.⁶ But where appellant presents no argument or authorities in support of an alleged error, the appellate court will not consider the assignment of error, unless the error is so unmistakable that it reveals itself by a casual inspection of the record.⁷

§ 5112. **Errors in Evidence.**—Where this court sees clearly and beyond doubt that the admission or rejection of improper evidence could in no way materially affect the result, the judgment on that ground will not be disturbed;⁸ or where it could have no effect on the verdict;⁹ or when it is plain that the result must have been the same without such evidence;¹⁰ or where defendant had suffered no injury thereby;¹¹ or where the findings show that the evidence improperly admitted was disregarded;¹² or if the party would not have been entitled to recover if the excluded testimony had been admitted;¹³ as where there was sufficient uncontradicted evidence to warrant the verdict;¹⁴ or where the same facts were afterwards proved by competent evidence;¹⁵ or where admitted by the pleadings.¹⁶ So the improper exclusion of evidence upon a question finally decided in favor of appellant will not be a ground for reversing the judgment;¹⁷ or the exclusion of a question which had been already answered in sub-

¹ *People v. Anderson*, 26 Cal. 130.

² *Schenectady and Saratoga R. R. Co. v. Thatcher*, 11 N. Y. 102; *Kent v. Harcourt*, 33 Barb. 491; *Miller v. The Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 284; *Colvin v. Burnet*, 2 Hill, 620; *Hearsey v. Pruyn*, 7 Johns, 179; *Oakes v. Thornton*, 28 N. H. 44.

³ *Spencer v. Ballou*, 18 N. Y. 327; but see *Cady v. Allen*, 18 Id. 573; *Stewart v. Smith*, 14 Abb. Pr. 75.

⁴ *Polack v. McGrath*, 38 Cal. 666.

⁵ *Smith v. Devlin*, 23 N. Y. 363.

⁶ *Howard v. Richards*, 2 Nev. 128.

⁷ *Allison v. Hagan*, 12 Nev. 38.

⁸ *Persse v. Cole*, 1 Cal. 369; *Mills v. Barney*, 22 Id. 240; *Kidd v. Temple*, Id. 255; *Henry v. Evarts*, 30 Cal. 425; *Hastings v. Jackson*, 46 Id. 234;

Lowery v. Steward, 3 Bosw. 505; *Boyd v. Foot*, 5 Id. 110.

⁹ *Young v. Emerson*, 18 Cal. 416.

¹⁰ *Belmont v. Coleman*, 1 Bosw. 188.

¹¹ *Hicks v. Whiteside*, 23 Cal. 404; *Paige v. O'Neal*, 12 Id. 483; *Hoag v. Pierce*, 28 Id. 187; *Tyler v. Green*, Id. 406; *Boyce v. Cal. Stage Co.*, 25 Id. 460; *Norwood v. Kenfield*, 30 Id. 393; *Moon v. Rollins*, 36 Id. 333.

¹² *Bee v. S. F. & H. B. R. R. Co.*, 46 Cal. 249.

¹³ *Merle v. Mathews*, 26 Cal. 455.

¹⁴ *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263.

¹⁵ *Schenck v. Dart*, 22 N. Y. 420.

¹⁶ *Castree v. Gavelle*, 4 E. D. Smith, 425.

¹⁷ *Beekman v. Platner*, 15 Barb. 550.

stance by the witness;¹ or premitting a witness to be questioned as to his opinion, provided the answer only stated facts;² or forbidden a witness to testify from a written paper, if he did not subsequently give any testimony.³ So the refusal to permit an answer to a proper question becomes immaterial by the introduction of the same matter under a subsequent interrogatory;⁴ or the improper exclusion of a witness if the fact proposed to be proved by him could not have affected the result.⁵

§ 5113. **Error in Law.**—A new trial will not be granted on account of the erroneous rejection of certain evidence, if evidence was subsequently given without contradiction which entitled the adverse party to recover;⁶ submission of a question to the jury, proper for the court, where the decision by the court must have been the same;⁷ error in instructions on a point entirely immaterial to the case,⁸ or which could not possibly have misled the jury;⁹ or where an instruction was defective by reason of an omission, but the omission was supplied in another instruction given.¹⁰

§ 5114. **Error in Pleadings.**—If the court refuses to allow defendant to amend his answer, but no injury results from the refusal, the judgment will not be reversed on this ground;¹¹ nor for defects in the complaint, where it can be gathered therefrom as a whole that the plaintiff had a cause of action upon which he was entitled to judgment, however defectively the cause of action may have been stated.¹²

§ 5115. **Harmless Errors.**—A judgment will not be reversed for error that can in no respect injure the appellant;¹³ unless it affirmatively appear that injustice has been done;¹⁴ or for errors not affecting substantial rights;¹⁵ or for errors of the court which do not materially affect the merits of the case;¹⁶ or when appellant has no interest in the subject-matter;¹⁷ or for errors which affect only the rights of parties who have not appealed.¹⁸ A

¹ Park Bank v. Tilton, 15 Abb. Pr. 384.

² Dolittle v. Eddy, 7 Barb. 74.

³ Howland v. Willetts, 9 N. Y. 170.

⁴ Real Del Monte G. & S. M. Co. v. Thompson, 22 Cal. 542.

⁵ City Bank of Brooklyn v. Dearborn, 20 N. Y. 244.

⁶ Gildersleeve v. Mahoney, 5 Duer, 383.

⁷ Miller v. Eagle Life and Health Ins. Co., 2 E. D. Smith, 269.

⁸ Willoughby v. Comstock, 3 Hill, 389; Hayden v. Palmer, 2 Id. 205.

⁹ Johnson v. Hudson Riv. R. R. Co., 20 N. Y. 74.

¹⁰ Livermore v. Stine, 43 Cal. 274.

¹¹ Jones v. Block, 30 Cal. 227.

¹² Hallock v. Jaudin, 34 Cal. 167.

¹³ Kilburn v. Ritchie, 2 Cal. 145; Wilkinson v. Parrott, 32 Id. 102; Garwood v. Wood, 34 Id. 248; Mott v. Reyes, 45 Id. 379; Campbell v. Pratt, 2 Pet. 354.

¹⁴ Broadus v. Nelson, 16 Cal. 80; Robinson v. Smith, 14 Id. 254.

¹⁵ Peters v. Foss, 20 Cal. 586.

¹⁶ Clayton v. West, 2 Cal. 381; Carpenter v. Gardiner, 29 Id. 160.

¹⁷ Hobbs v. Duff, 43 Cal. 485.

¹⁸ Speyer v. Ihmels, 21 Cal. 280.

party is not injured by an error if the error does not prevent him from making out his case.¹

§ 5116. **Rule of Conflict of Evidence.**—If the evidence clearly preponderates against the verdict or finding, it is the duty of the court below to set it aside, but the appellate court will not disturb the verdict or finding where the evidence is conflicting.² The judgment will not be reversed where there appears to have been a substantial conflict of evidence.³ The rule applies to law and equity cases alike.⁴ The same rule applies to the report of commissioners appointed to assess damages and estimate benefits in widening of streets.⁵ But the rule does not apply where the evidence in the court below consists of depositions.⁶

§ 5117. **Wrong Reasoning.**—An order granting a new trial will not be reversed because the reason assigned is a bad one, if there was a good reason for granting it.⁷ The order stands upon the facts in the record.⁸ If a judgment or order is right, that it could not be sustained upon the theory of law on which the court below proceeded is no reason for reversing it.⁹ A judgment which is right will not be reversed because rendered upon a wrong reason.¹⁰ Where a decision was correct when made, it will not be reversed by reason of any matter of fact not shown or offered in the court below.¹¹

§ 5118. **Legal Presumptions.**—The legal presumption is in favor of the correctness of the findings and decision of the court below, and when attacked on motion for new trial, will be sustained on appeal, unless it be affirmatively shown that they are erroneous. When this is attempted by way of showing that certain specified facts, other than those expressly found by the court, were proved by the evidence, it must likewise appear that such facts would require a different finding or decision from the

¹ Hebrard v. Jefferson G. & S. M. Co., 33 Cal. 290.

² Hawkins v. Abbott, 40 Cal. 639; Phillpots v. Blasdel, 8 Nev. 61.

³ Crook v. Forsyth, 30 Cal. 662; Wilkinson v. Parrott, 32 Id. 102; McNeil v. Shirley, 33 Id. 202; Hardenbergh v. Bacon, 32 Id. 356; Hall v. Bark Emily Banning, Id. 522; Wendt v. Ross, Id. 650.

⁴ Ritter v. Stock, 12 Cal. 402; Doe v. Vallejo, 29 Id. 386.

⁵ Appeal of Piper, 32 Cal. 530; Appeal of Brooks and Josephs, 32 Id. 558.

⁶ Wilson v. Cross, 33 Cal. 51.

⁷ Bolton v. Stewart, 29 Cal. 615; Grant v. Moore, Id. 644.

⁸ Coghill v. Marks, 29 Cal. 673.

⁹ Munro v. Potter, 34 Barb. 358; Gillespie v. Torrance, 7 Abb. Pr. 462; Deland v. Richardson, 4 Denio, 95; Davis v. Spencer, 24 N. Y. 386; Scott v. Pilkington, 15 Abb. Pr. 280; Mills v. Van Voorhies, 20 N. Y. 412.

¹⁰ Helm v. Dumars, 3 Cal. 454; Blevin v. Freer, 10 Id. 172.

¹¹ Wallace v. Eldredge (No. 2.), 27 Cal. 498.

one rendered, or the specification will be held insufficient.¹ On appeal, the presumption lies that the court below discharged its duty, that its proceedings were regular, and its action founded on proper proof, unless there is something in the record to overcome such presumption.² It will be presumed that the record contains all the evidence.³ A refusal to allow an amendment is presumed to be right unless the character of the proposed amendment is shown in the record.⁴ If the instructions to the jury appear in the record, but the evidence or facts do not, the instructions will be presumed to be correct, and warranted by the facts.⁵ In the absence of the instructions given to the jury, the presumption is that the law applicable to the facts was correctly stated by the court.⁶ Where a decree recited that the entry thereof was consented to by defendants, it will be presumed, when attacked collaterally, that the consent was given in such manner as to give the court jurisdiction of their persons.⁷ The presumption is that all the facts in a record bearing on the points decided have received due consideration by the supreme court, whether all or a part or none of those facts are mentioned in the opinion.⁸ Where there are two presumptions equally reasonable, arising upon the face of the record, the court is bound to adopt that which will maintain the judgment of the court below.⁹

§ 5119. **Evidence.**—Where there has been no objection raised or exceptions taken to insufficiency of the evidence, the court will presume that proper evidence was given.¹⁰ The presumption of law is that there was evidence to sustain every material fact found by the jury;¹¹ and that facts imperfectly alleged have been proved.¹²

¹ *White v. Abernathy*, 3 Cal. 426; *Landers v. Bolton*, 26 Id. 403; *Moyes v. Griffith*, 35 Id. 556; *Miles v. Thorne*, 38 Id. 335; *Herriter v. Porter*, 23 Id. 385; *Hastings v. Cunningham*, 35 Id. 549; *Drummond v. Magruder*, 9 Cranch, 122; *The Potomac*, 2 Black, 581.

² *Ford v. Holton*, 5 Cal. 321; *Owen v. Morton*, 24 Id. 378; *Dimick v. Campbell*, 31 Id. 238; *Sharp v. Daugney*, 33 Id. 512; *Moore v. Massini*, 43 Id. 389; *Wilson v. Dougherty*, 45 Id. 34; *People v. Colson*, 49 Id. 679; *Crane v. Brannan*, 3 Id. 185; *Slyck v. Taylor*, 9 Johns. 146; *Lamotte v. Archer*, 4 E. D. Smith, 46; *Beattie v. Qua*, 15 Barb. 132; *Oakley v. Van Horn*, 21 Wend. 305; *Darby v. Callaghan*, 16 N. Y. 71;

Matter of the Empire City Bank, 18 Id. 199; *Carman v. Pultz*, 21 Id. 547; *Hoyt v. Hoyt*, 8 Bosw. 511.

³ *Orcutt v. Cahill*, 24 N. Y. 578; *Calligan v. Mix*, 12 How. Pr. 495; *Ford v. Holton*, 5 Cal. 322.

⁴ *Jessup v. King*, 4 Cal. 331.

⁵ *People v. McCauley*, 1 Cal. 386; *People v. Baker*, Id. 405; *White v. Abernathy*, 3 Id. 426.

⁶ *Aldrich v. Palmer*, 24 Cal. 515.

⁷ *Thompson v. Connolly*, 42 Cal. 313.

⁸ *Mulford v. Estudillo*, 32 Cal. 131.

⁹ *Whipley v. Fowler*, 6 Cal. 630.

¹⁰ *Bunting v. Beideman*, 1 Cal. 182.

¹¹ *Doll v. Anderson*, 27 Cal. 248.

¹² *Barron v. Frink*, 30 Cal. 486.

§ 5120. **Practice.**—It must be shown that the court erred in striking out the answer; error will not be presumed.¹ When there are both issues of law and fact, joined in the same cause, and the cause is tried on the issues of fact, and a judgment rendered, the presumption will be indulged, on appeal, that the issue of the law had been first disposed of.² Exceptions appearing in the case as settled will be assumed to have been taken in due time and form.³

§ 5121. **When Judgment will be Affirmed.**—The judgment of the court below will be sustained if there is one conclusive ground upon which it can rest.⁴ When a judgment is correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the court below.⁵ It is no objection to an affirmance that judgment can only be sustained on grounds that were not suggested by counsel below.⁶ When the supreme court is equally divided upon an appeal, the judgment stands affirmed.⁷ The supreme court will not generally set aside a verdict where the judge and jury harmonize in its support.⁸ Where substantial justice has been done, the appellate court will not reverse the judgment on merely technical grounds;⁹ or for a mere variance.¹⁰ If the appellant can gain nothing by a new trial, judgment will not be reversed.¹¹ A judgment will not be reversed for errors that can in no respect injure the appellant.¹² On appeal from judgment on a demurrer as frivolous, judgment should be affirmed if the demurrer was bad, though not frivolous.¹³ If an appellate court finds that the facts stated in the complaint, with all legal intendments in its favor, will not support the judgment, the judgment must be reversed, though counsel may not have hit on the proper grounds for asking a reversal.¹⁴ Where the questions raised by the record have been repeatedly settled by the appellate court,

¹ Dimick v. Campbell, 31 Cal. 238; Landers v. Bolton, 26 Id. 393.

² Brooks v. Douglass, 32 Cal. 208; Townsend v. Jemison, 7 How. U. S. 706.

³ Hunt v. Bloomer, 13 N. Y. 341.

⁴ Blevin v. Freer, 10 Cal. 172.

⁵ Kidd v. Teeple, 22 Cal. 255; Otis v. Spencer, 16 N. Y. 610; S. C., 15 How. Pr. 425; S. C., 6 Abb. Pr. 127; Titus v. Orvis, 16 N. Y. 617.

⁶ Oneida Bank v. Ontario Bank, 21 N. Y. 490; White v. Madison, 26 Id. 117.

⁷ Etting v. U. S. Bank, 11 Wheat. 59; The Antelope, 10 Id. 66; Wash-

ington Bridge Co. v. Stewart, 3 How. U. S. 413.

⁸ Antoine Co. v. Ridge Co., 23 Cal. 219.

⁹ Fisher v. Reider, Hempst. 82.

¹⁰ Cook v. Gray, Hempst. 84.

¹¹ Larco v. Casaneuava, 30 Cal. 560.

¹² Thompson v. Lyon, 14 Cal. 39; Mitchell v. Bromberger, 2 Nev. 345.

¹³ Witherhead v. Allen, 28 Barb. 661; Wesley v. Bennett, 5 Abb. Pr. 498; Martin v. Kanouse, 2 Id. 327; Laverty v. Griswold, 12 N. Y. Leg. Obs. 316; Manning v. Tyler, 21 N. Y. 570.

¹⁴ Van Doren v. Tjader, 1 Nev. 380.

or are decided by reference to plain elementary principles of law, the judgment will be affirmed, with damages.¹ When a demurrer to a complaint is properly sustained, with leave to amend, and the plaintiff declines to do so, the judgment will not be reversed on appeal, in order to allow the amendment. There must be error in order to allow the reversal of a judgment.² This court will not reverse a decision, after a trial on the merits, for defects in the declaration which were amendable in the court below.³

When the case made by plaintiff's proof differs from the averments of the complaint, and defendant does not object to the introduction of evidence on this ground, the court will not reverse the judgment on account of the variance.⁴ An order of the court below, granting a new trial, will not be disturbed where the statement contains only an outline of the evidence, without any rulings or instructions of the court, and not purporting to give all the evidence, and that given not being clearly in favor of the verdict, the appellate court will not interfere.⁵ Where there are no assignments of errors by the appellant, judgment will be affirmed. Affirmative error must be shown.⁶ On an appeal from an order made after final judgment, directing the receiver to pay over to the prevailing party moneys in his hands, the supreme court can not reverse the order appointing the receiver.⁷ A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants. This court will not reverse a judgment dismissing an action for want of prosecution, unless there has been an abuse of discretion in the court below in giving the judgment; and it devolves on the appellant to show such abuse of discretion.⁸ In Pennsylvania, it has been held that a judgment will not be reversed because the court below erred in prescribing the order in which counsel should address the jury.⁹ Where the findings do not contain all the facts necessary to be proved in order to entitle the prevailing party to a judgment, it will not be reversed, unless the court below has, after defect has been pointed out, failed or refused to make the

¹ Pinkham v. Wemple, 12 Cal. 449;
Field v. Campbell, 17 La. Ann. 30.

² Sutter v. San Francisco, 36 Cal. 112.

³ Shoenberger's Ex'rs v. Zook, 34 Pa. St. 24.

⁴ Marshall v. Ferguson, 23 Cal. 66.

⁵ Loucks v. Edmondson, 18 Cal. 203.

⁶ People v. Goldberg, 10 Cal. 312;
People v. Levison, 16 Id. 98.

⁷ Whitney v. Buckman, 26 Cal. 451.

⁸ Grigsby v. Napa County, 36 Cal. 585.

⁹ Smith v. Frazier, 53 Pa. St. 226.

required finding, and exception has been taken thereto.¹ If the facts in issue are not found, and the evidence is not set out in the transcript, the appellate court will not undertake to say that it was proved. Evidence tending to prove a fact does not necessarily amount to proof of the fact.² Where the findings support the judgment, and the record discloses no exceptions to admission of evidence or the rulings of the court, the judgment will be affirmed.³ A judgment will not be reversed on the findings alone, unless they show affirmatively that the judgment could not properly have been rendered.⁴ A judgment on the report of referee will not be reversed for failure to find on issues, where no evidence would warrant findings in favor of the appellant.⁵

§ 5122. **Modification of Judgment.**—Where the judgment below is erroneous, the appellate court will so modify it as finally to settle the controversy, where the rights of the parties appear from the record to be fully ascertained.⁶ A judgment will be modified and affirmed where there is an error which the record enables the appellate court fully to correct.⁷ Where, in ejectment against several defendants, the judgment for damages is several instead of joint, the damages may be remitted, and the judgment for the land may stand.⁸ Respondent may remit damages, and pay costs of appeal;⁹ or the excess of damages over amount claimed may be remitted, and the judgment stand.¹⁰ The judgment of a court can only be changed on a petition for rehearing or a modification.¹¹ The court may direct that judgment be affirmed on respondent's remitting that part of it which is erroneous, if capable of exact calculation.¹² Where there is a discrepancy between the findings of fact and the judgment, the appellate court will order the proper modification of the judgment.¹³ The appellate court, in reversing a judgment and direct-

¹ *Lyon v. Leimback*, 29 Cal. 139; but see *Dowd v. Clark*, 51 Id. 262.

² *Merrill v. Chapman*, 34 Cal. 251.

³ *Hutchinson v. Ryan*, 11 Cal. 142; *Clark v. Huber*, 20 Id. 196.

⁴ *Semple v. Cook*, 50 Cal. 26.

⁵ *Alger v. Raymond*, 7 Bosw. 418.

⁶ *Persse v. Cole*, 1 Cal. 369; *Gahan Neville*, 2 Id. 81; *Bidleman v. Kewan*, Id. 249; *Williams v. Santa Clara etc. Co.*, 4 West Coast Rep. 616.

⁷ *Union Wat. Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621.

⁸ *Curtis v. Herrick*, 14 Cal. 117.

⁹ *Doll v. Feller*, 16 Cal. 432; *La Motte v. Archer*, 4 E. D. Smith, 46.

¹⁰ *Pierce v. Payne*, 14 Cal. 419.

¹¹ *Houston v. Williams*, 13 Cal. 24.

¹² *Boyd v. Foot*, 5 Bosw. 110; *McAuley v. Mildrum*, 9 Abb. Pr. 198; *Corning v. Corning*, 6 N. Y. 97; *Moffett v. Sackett*, 18 Id. 522; *O'Shea v. Kirker*, 4 Bosw. 120; 8 Abb. Pr. 69. Case where the supreme court refused to modify its judgment of reversal, though an offer to remit the damages was made: *Ellis v. Jeans*, 26 Cal. 272. Case remanded, with directions to add to the judgment the yearly rent of the land as found by the jury: *Bay v. Pope*, 18 Id. 694.

¹³ *Clark v. Huber*, 20 Cal. 196.

ing the entry of a judgment in the court below, does not order a new trial.¹ When the appellate court directs the court below what judgment to render, instead of directing it to modify its judgment, it is a reversal of the judgment of the court below.² A judgment can not be affirmed as to part of the amount recovered, and reversed as to the residue, as between the same parties, where a new trial is granted as to the part reversed.³

Where an appeal is only from an order denying a new trial, the appellate court may go back to the complaint and strike out one or more causes of action, and may modify the judgment.⁴ In an action for the recovery of chattels the supreme court should modify the judgment by making it in the alternative for the return of the property or for its value.⁵ Where the judgment is in harmony with the pleadings and findings of fact, but erroneous by reason of a variance between the findings and proof, the judgment will not be modified to suit the proof.⁶ Where only one of several defendants against whom a judgment had been rendered appeals, the appellate court, if it reverses the judgment, may reverse or modify it as to any or all the parties defendant. But where, in such case, the error assigned only affects the party appealing, the court will not presume error as to the parties not appealing, and will not reverse the judgment as to them;⁷ or a judgment may be reversed as to part of the amount, and affirmed as to the rest,⁸ and costs will be awarded in favor of the one as to whom judgment was reversed.⁹ The law regards the substance more than the form, and the appellate court will compel the court below to issue an attachment to punish a contempt which is in substance a private right, though in form a case of contempt.¹⁰ If the judgment is erroneous, and the findings of fact will enable the supreme court to

¹ *Argenti v. San Francisco*, 30 Cal. 458.

² *Id.*

³ *Story v. N. Y. & Harlem R. R. Co.*, 2 Seld. 85.

⁴ *Argenti v. San Francisco*, 30 Cal. 458.

⁵ *Fitzhugh v. Wiman*, 9 N. Y. 559; *O'Shea v. Kirker*, 4 Bosw. 120.

⁶ *Clark v. Huber*, 20 Cal. 196.

⁷ *Minturn v. Bayles*, 33 Cal. 129; *Ricketson v. Richardson*, 26 Id. 149; consult also *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; *Giraud v. Beach*, 4 E. D. Smith, 27; *Williams*

v. Christie, 4 Duer, 29; *Fields v. Moul*, 15 Abb. Pr. 6.

⁸ *Brownell v. Winnie*, 29 N. Y. 400; *Staats v. Hudson River Railroad Co.*, 39 Barb. 298; *Pinkney v. Keyler*, 4 E. D. Smith, 469; *Rosenbaum v. Gunter*, 3 Id. 203; *Fields v. Moul*, 15 Abb. Pr. 6; overruling *Kasson v. Mills*, 8 How. Pr. 377. Even when for entire damages: *Decker v. Hassel*, 26 Id. 528; *Fields v. Moul*, 15 Abb. Pr. 6.

⁹ *Montgomery County Bank v. Albany City Bank*, 3 Seld. 459.

¹⁰ *Merced County v. Fremont*, 7 Cal. 130.

determine what kind of a judgment should have been rendered, it will direct the court below to render the proper judgment.¹

§ 5123. **Reversal of Judgment.**—On an appeal from a judgment, if an error has been committed which may by possibility have prejudiced appellant, judgment must be reversed.² A judgment against clear, uncontradicted, and unimpeached evidence must be reversed.³ But the uncontradicted evidence of an interested witness, as a party in the suit, may be disregarded.⁴ And where judgment was for the defendant, if error is disclosed in the admission of improper testimony in defendant's favor, the judgment will be reversed, and a new trial ordered, without considering whether or not the plaintiff proved a case entitling him to relief.⁵ Where the evidence is conflicting, the supreme court will not reverse the order of the court below denying a new trial.⁶ If erroneous or illegal evidence is admitted, and the record does not negative the presumption that injury was sustained thereby, the judgment will be reversed,⁷ though the defendant did not appear on the trial;⁸ and so, where judgment was entirely unsupported by evidence;⁹ or if competent evidence was excluded which might possibly have changed the result.¹⁰ The supreme court will reverse the judgment of the court below where the

¹ Love v. Shartzter, 31 Cal. 488. See as to awarding proper judgment, or modifying judgment when all the facts are before the court, Gage v. Brewster, 31 N. Y. 218; McDougall v. Cooper, Id. 498; People v. Supervisors of Richmond, 28 Id. 112; Beach v. Cook, Id. 508; Brownell v. Winnie, 29 Id. 400; 29 How. Pr. 193; In re Livingston's Petition, 34 N. Y. 555; S. C., 32 How. Pr. 20; S. C., 2 Abb. Pr. 1.

² Brown v. Richardson, 20 N. Y. 472; Erben v. Lorillard, 19 Id. 299; Williams v. Fitch, 18 Id. 546; Underhill v. New York and Harlem Railroad Company, 21 Barb. 489; Worrall v. Parmelee, 1 N. Y. 519; Weber v. Kingsland, 8 Bosw. 415; Hahn v. Van Doren, 1 E. D. Smith, 411; Clark v. Vorce, 19 Wend. 232; Farmers' and Manufacturers' Bank v. Whinfield, 24 Id. 419; Gillet v. Mead, 7 Id. 193; Clark v. Dutcher, 9 Cow. 674.

³ Evans v. Wood, 15 Abb. Pr. 416; Armstrong v. Smith, 44 Barb. 120; Jacks v. Darrin, 3 E. D. Smith, 557; Goldsmith v. Obermeier, Id. 121; Conlan v. Latting, Id. 354; Orcutt v. Cahill, 24 N. Y. 578; Fox v. Decker, 3 E. D. Smith, 150.

⁴ Roberts v. Gee, 15 Barb. 449.

⁵ Reddington v. Waldon, 22 Cal. 185.

⁶ Preston v. Keys, 23 Cal. 194; Lane v. Brown, 22 Ind. 239.

⁷ Roff v. Duane, 27 Cal. 565; Lalley v. Wise, 28 Id. 539; Worrall v. Parmelee, 1 N. Y. 519; Marquand v. Webb, 16 Johns. 89; Osgood v. Manhattan Co., 3 Cow. 612; Tappan v. Butler, 7 Bosw. 480; Main v. Eagle, 1 E. D. Smith, 621; Hahn v. Van Doren, Id. 411; Belden v. Nicolay, 4 Id. 14.

⁸ Squier v. Gould, 14 Wend. 159; Finch v. McDowell, 7 Cow. 537; McNutt v. Johnson, 7 Johns. 18; Lynch v. McBeth, 7 How. Pr. 113.

⁹ Davidson v. Hutchins, 1 Hilt. 123; Storp v. Harbutt, 4 E. D. Smith, 464; Hunt v. Westervelt, Id. 225; Calligan v. Mix, 12 How. Pr. 495; Howard v. Brown, 2 E. D. Smith, 247; Wiley v. Slater, 22 Barb. 506; Fish v. Skut, 21 Id. 333; Rathbone v. Stanton, 6 Id. 141.

¹⁰ McAllister v. Sexton, 4 E. D. Smith, 41; Raymond v. Richardson, Id. 171; Tuttle v. Hunt, 2 Cow. 436; Irvine v. Cook, 15 Johns. 239; Penfield v. Carpenter, 13 Id. 350; Haswell v. Bussing, 10 Id. 128; Martin v. Garrett, 4 E. D. Smith, 346.

facts found by the court are not sufficient to support the judgment.¹ If a judgment was rendered before the code of civil procedure took effect, and there was no finding of facts or agreed statement of facts, the supreme court, on reversing the judgment, will not direct judgment to be entered in favor of the losing party.² For error in refusing to give instructions to the jury the judgment will be reversed;³ or for any error in a charge which might have misled the jury;⁴ or for error in charge of judge;⁵ or for refusal to charge on a proper request.⁶ A judgment rendered by the district court after the time appointed by law for its adjournment will be reversed.⁷ Even though a judgment appears to be correct on the merits, it will be reversed for a mistrial.⁸ An order of the court below setting aside a judgment, where it does not appear that a copy of the order to show cause why the judgment should not be set aside was served on plaintiff or his attorney, will be reversed on appeal.⁹ A judgment by default will be reversed, unless the record show service on the defendant or appearance.¹⁰ If the plaintiff admits in the pleadings that he never had a cause of action, the supreme court will reverse the judgment, and either order a judgment in defendant's favor or remand the cause for further proceedings.¹¹ Where the complaint fails to state facts sufficient to constitute a cause of action, judgment by default thereon will be reversed on appeal.¹² The judgment of a court on a second trial, an appeal from the first trial being taken and perfected, will be reversed, because the court could not proceed with the second trial until the appeal from the order was determined.¹³ If a company is sued by a wrong name, but answers by its true name, and judgment is rendered against it by its true name, the judgment is not void, and the supreme court on appeal, in affirming the judgment, will direct the court below to substitute the true name in the complaint.¹⁴

§ 5124. **Reversal, Effect of.**—If the judgment is reversed, the parties are remitted to their original rights, and may proceed

¹ Davis v. Caldwell, 12 Cal. 125.

² The Cen. P. R. R. Co. v. Robinson, 49 Cal. 446.

³ Busenius v. Coffee, 14 Cal. 91; De Benedetti v. Mauchin, 1 Hilt. 213.

⁴ Pettit v. Ide, 12 Abb. Pr. 44.

⁵ Whitney v. Wells, 28 How. Pr. 150; Pettit v. Ide, 12 Abb. Pr. 44.

⁶ De Benedetti v. Mauchin, 1 Hilt. 213; Halloran v. N. Y. and Erie R. R. Co., 2 E. D. Smith, 257.

⁷ Smith v. Chichester, 1 Cal. 409.

⁸ Cobb v. Cornish, 6 Abb. Pr. 129;

S. C., 16 N. Y. 602; Gilbert v. Beach, Id. 606; Purchase v. Mattison, 15 Abb. Pr. 402.

⁹ Vallejo v. Green, 16 Cal. 160.

¹⁰ Schloss v. White, 16 Cal. 65; Burt v. Scrantom, 1 Id. 416; Joyce v. Joyce, 5 Id. 449.

¹¹ Mulford v. Estudillo, 32 Cal. 131; Barron v. Frink, 30 Id. 486.

¹² Hallock v. Jaudin, 34 Cal. 167.

¹³ Ford v. Thompson, 19 Cal. 119.

¹⁴ Mahon v. San Rafael T. R. Co.,

49 Cal. 270.

as though no action had ever been brought.¹ The reversal of a judgment restores any advantage which may have been derived from its rendition.² Property purchased by the plaintiff on sale under judgment reversed must be restored;³ but otherwise as to a stranger, a *bona fide* purchaser without notice.⁴ The assignee of a judgment, and of the sheriff's certificate of sale thereunder, stands in the same position as his assignor.⁵

§ 5125. **When Judgment will be Reversed and New Trial Ordered.**—A new trial must be ordered whenever it is necessary as a matter of right.⁶ So where there are disputed facts to be decided,⁷ or where the evidence was opposed to the verdict,⁸ or where erroneous instructions have been given;⁹ but not where it is apparent that no possible state of proof applicable to the issues can entitle respondent to a judgment.¹⁰ On reversing a case, the appellate court may in its discretion award a new trial.¹¹ Where nothing appears on the record, either in the pleadings, evidences, or judgment, from which the court can ascertain the rights of the parties, and where it is highly probable that the judgment of the court below is founded neither upon law nor equity, the case may be remanded for new trial.¹² On review of error on the trial, in the process of ascertaining the facts, the proper judgment on reversal will be one ordering a new trial.¹³ Where proper, an absolute reversal may be ordered as to some and a new trial awarded as to others of the appellants.¹⁴ The appellate court may add to the judgment of reversal that the cause be tried *de novo*, or that a particular issue be tried.¹⁵ The court below may be allowed to enter judgment for plaintiff for the amount of the verdict, or otherwise to retry the cause.¹⁶ An order for a new trial is not "equivalent to a

¹ Hunt v. Hoboken Land Co., 1 Hilt. 161; Ellert v. Kelly, 4 E. D. Smith, 12; S. C., 10 How. Pr. 392.

² Reynolds v. Harris, 14 Cal. 667; Estus v. Baldwin, 9 How. Pr. 80; Sheridan v. Mann, 5 Id. 201.

³ Reynolds v. Harris, 14 Cal. 667.

⁴ Id.

⁵ Id.

⁶ Griffin v. Marquardt, 17 N. Y. 28.

⁷ Lick v. Diaz, 37 Cal. 437; Polhemus v. Carpenter, 42 Id. 375.

⁸ Maine Boys T. Co. v. Boston T. Co., 37 Cal. 40.

⁹ Slaughter v. Fowler, 44 Cal. 195; McCreery v. Everding, Id. 246.

¹⁰ Edmonston v. McLoud, 16 N. Y. 543; Marquat v. Marquat, 12 Id. 336.

¹¹ Griffin v. Marquat, 17 N. Y. 28;

Astor v. L'Amoureux, 4 Seld. 107;

Marquat v. Marquat, 2 Kern. 336;

Moffet v. Sackett, 18 N. Y. 522;

Schenck v. Dart, 22 Id. 420.

¹² Reed v. Jourdain, 1 Cal. 101.

¹³ Marquat v. Marquat, 2 Kern. 336;

Astor v. L'Amoureux, 4 Seld. 107; Ed-

monston v. McLoud, 16 N. Y. 543;

Griffin v. Marquat, 17 Id. 28; Meyer

v. City of Louisville, 26 Barb. 609;

Cobb v. Cornish, 16 N. Y. 602; Irwin

v. Lawrence, 1 Hilt. 352; Moffet v.

Sackett, 18 N. Y. 522.

¹⁴ Williams v. Christie, 4 Duer, 29.

¹⁵ Argenti v. San Francisco, 30 Cal. 458.

¹⁶ Reniff v. The Cynthia, 18 Cal. 669.

new action.”¹ Where judgment is reversed and a new trial granted, the case goes back for trial on all the issues of fact raised by the pleadings,² the parties having the same right which they originally had.³ But a new trial will not be awarded for an error by which the rights of the party were not prejudiced,⁴ nor where it is clearly seen that after perhaps a protracted litigation the result must be the same.⁵

§ 5126. **Defective Pleading.**—Where on appeal the complaint is so radically defective as not to authorize the judgment, a new trial may be granted, with leave to plaintiff to amend.⁶ In cases where supreme court, after reversing judgment by default, some of the items of the complaint being illegal, remanded the cause, with liberty to the defendant to set up defense.⁷

§ 5127. **Findings.**—Where the findings of the court are clearly not warranted by the evidence, a new trial should be granted.⁸ Where the testimony is all one way, and the finding is contrary to the evidence, a new trial will be granted;⁹ or if the evidence was such that if the question had been submitted to a jury the court would set aside the verdict as contrary to the evidence.¹⁰ A court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence was insufficient to justify his decision.¹¹

§ 5128. **In Injunction.**—In a case of injunction and damages, where the injunction, but not the damages, was allowed, and both parties appeal, the one from the injunction and the other from the order refusing damages, the court will remand the cause for trial *de novo*, on the question of damages.¹²

§ 5129. **Newly Discovered Evidence.**—Where the record does not contain the evidence given on the trial, the supreme court will not hold the refusal of a new trial on account of newly discovered evidence to be error, as it can not know how far the new evidence is merely cumulative.¹³

§ 5130. **State of Excitement.**—Where it is manifest that the verdict was given under a state of great excitement, and the

¹ United States v. Hawkins, 10 Pet. 125.

² Hidden v. Jordan, 28 Cal. 301.

³ Stearns v. Aguirre, 7 Cal. 443; Argenti v. San Francisco, 30 Id. 458; Phelan v. San Francisco, 9 Id. 15.

⁴ Kilburn v. Ritchie, 2 Cal. 148; Tyler v. Green, 28 Id. 406; Carpenter v. Gardiner, 29 Id. 160.

⁵ Tobler v. Folsom, 1 Cal. 213;

Sunol v. Hepburn, Id. 285; Smith v. Compton, 6 Id. 26.

⁶ Sterling v. Hanson, 1 Cal. 479.

⁷ People v. Hager, 19 Cal. 462.

⁸ Bolton v. Stewart, 29 Cal. 615.

⁹ Lyle v. Rollins, 25 Cal. 440.

¹⁰ Moore v. Murdock, 26 Cal. 514.

¹¹ Cappe v. Brizzolara, 19 Cal. 607.

¹² Jungerman v. Bovee, 19 Cal. 355.

¹³ Cowden v. Wade, 23 Ind. 471.

court below had refused a new trial, the appellate court will reverse the judgment and order a new trial.¹

§ 5131. **Uncertainty of Law.**—Where the merits of the case were not investigated in the lower court, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the practice act in regard to interventions, a new trial was granted.²

§ 5132. **Wrong Construction.**—Where the complaint, evidence as admitted, the verdict and judgment, are all in harmony, but judgment is erroneous from a wrong construction given to the description of land in a deed in evidence, the supreme court can not modify the judgment, but a new trial will be granted.³

§ 5133. **Decisions on Appeal.**—A decision of the court is its judgment; the opinion is the reasons given for that judgment. The former, being entered on record immediately, can only be changed upon a petition for rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, until it is transcribed on the record with the consent of the writer, when it ceases to be the subject of change, except through regular proceedings before the court by petition.⁴ The legislature can not require the supreme court to give the reasons of its decisions in writing. The constitutional duty of the court is discharged by the rendition of its decision.⁵

§ 5134. **Rehearing.**—When judgment has been pronounced in the appellate court, and before the *remittitur* has been sent, a rehearing may be granted.⁶ But after an order had been made granting a rehearing, the filing of the *remittitur* in the court below did not take away the jurisdiction to hear the cause.⁷ Where the judgment was rendered by the supreme court in its original jurisdiction on an application in *mandamus*, an application for a rehearing will not be entertained, unless a motion for a new trial is made, as in cases arising in the district courts.⁸

§ 5135. **Motion to Amend.**—A motion to amend the judgment of the supreme court must be made within the time allowed for filing a petition for rehearing.⁹ A material modification should not be made on such a motion; rehearing should

¹ People v. Acosta, 10 Cal. 195.

² Speyer v. Ihmels, 21 Cal. 280.

³ Hicks v. Coleman, 25 Cal. 122.

⁴ Houston v. Williams, 13 Cal. 24.

⁵ Id.

⁶ Rule 20, Cal. Sup. Ct.; Grogan v.

Ruckle, 1 Cal. 193; Ruse v. Mut. Life Ins. Co., 24 N. Y. 653; Hoyt v. Thompson's Ex'r, 19 Id. 207.

⁷ Grogan v. Ruckle, 1 Cal. 193.

⁸ People v. Coon, 25 Cal. 635.

⁹ Gray v. Palmer, 11 Cal. 341.

be first granted.¹ A judgment of affirmance, for failure of the appellant to appear, will be set aside on a rehearing, where actual notice of argument was not given.²

§ 5136. **Points.**—On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument.³

§ 5137. **Practice on Rehearing.**—The petition filed must include all grounds on which the rehearing is claimed; those not included are deemed waived.⁴ The employment of new counsel after decision rendered is no ground for an extension of time for filing a petition for rehearing.⁵ Where respondent filed a petition for the modification of a final judgment, it was held to be a petition for a rehearing.⁶

§ 5138. **When It will be Granted.**—When no copy of appellant's briefs was served upon respondent, and the court decides the case against him without any brief on his part, a rehearing will be granted on application.⁷

§ 5139. **When not Granted.**—When there was a conflict of evidence, plaintiff and defendant being the only witnesses in the court below on which the verdict and judgment were rendered, motion for rehearing was denied.⁸ An equal division of the justices of the supreme court upon the question of granting a rehearing is a denial thereof.⁹

CHAPTER V.

REMITTITUR.

§ 5140. **In General.**—The cause having been finally disposed of in the highest court in the state, a *remittitur* is sent down instructing the court below as to the nature of such decision, and judgment is entered accordingly; or if a new trial is ordered, the cause again takes its place upon the district court calendar; or if the judgment is ordered modified, an order is entered in the court below showing the nature of the modification, and it then becomes and is a final judgment. Where the appellate

¹ Clark v. Boyreau, 14 Cal. 634; Argenti v. San Francisco, 30 Id. 458.

² Lightstone v. Lawrencel, 2 Cal. 106.

³ Grogan v. Ruckle, 1 Cal. 193; see Atherton v. Sup. San Mateo Co., 48 Id. 160; Mount v. Mitchell, 32 N. Y. 702.

⁴ Wilson v. Broder, 24 Cal. 190.

⁵ Ferris v. Coover, 10 Cal. 589; see also Hanson v. McCue, 43 Id. 178; Bernal v. Wade, 46 Id. 640.

⁶ Gray v. Gray, 11 Cal. 341; Rhea v. Surrhyne, 39 Id. 581.

⁷ Patterson v. Ely, 19 Cal. 28.

⁸ Fisher v. Merwin, 25 How. Pr. 284.

⁹ Ayres v. Bensley, 32 Cal. 632.

court reverses the judgment of the court below, and directs the entry of a final judgment, such entry of judgment on *remittitur* can be made in vacation, the act of the clerk in entering being merely ministerial.¹ When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme-court on appeal.² If it award a new trial, the clerk will place the cause on the calendar.³ In New York, it would seem, the practice is different; there the matter should be presented to the court on motion, and a suitable order applied for.⁴ When the *remittitur* has been duly and regularly issued from the supreme court, and filed in the court below, the supreme court loses all jurisdiction over the case,⁵ except in cases of the dismissal of an appeal obtained by fraud.⁶ A *remittitur* issued by mistake may be recalled;⁷ so where it is improperly issued from other causes.⁸ But a motion, therefore, to vacate a judgment on the ground that it was not rendered by the proper members of the court can not be entertained after the *remittitur* has been filed below.⁹ But the appellate court does not lose its jurisdiction while the order of dismissal is retained in counsel's hands;¹⁰ nor until it is filed in the court below.¹¹ But may modify it while *in transitu*.¹² Where the *remittitur* was irregular, by default taken contrary to stipulation, the court recalled the papers.¹³ A re-

¹ McMillan v. Richards, 12 Cal. 467; Dale v. Roosevelt, 1 Wend. 25.

² Cal. Code C. P., sec. 958.

³ Marysville v. Buchanan, 3 Cal. 212.

⁴ Chatauqua Co. Bank v. White, 23 N. Y. 347; Seacord v. Morgan, 17 How. Pr. 394; S. C., 4 Abb. Pr., N. S., 249. But see Judson v. Gray, 17 How. Pr. 289.

⁵ Blanc v. Bowman, 22 Cal. 23; Leese v. Clark, 20 Id. 387; Latson v. Wallace, 9 How. Pr. 334; Legg v. Overbaugh, 4 Wend. 188; Delaplaine v. Bergen, 7 Hill, 591; Dresser v.

Brooks, 2 N. Y. 559; Martin v. Wilson, 1 Id. 240; Frazer v. Weston, 3 How. Pr. 235.

⁶ Rowland v. Kreyenhagen, 24 Cal. 52.

⁷ Vance v. Peña, 36 Cal. 328.

⁸ Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Id. 640.

⁹ Blanc v. Bowman, 22 Cal. 23.

¹⁰ Thompson v. Blanchard, 2 N. Y. 561.

¹¹ Burkle v. Luce, 1 N. Y. 239.

¹² Hosack v. Rogers, 7 Paige Ch. 108.

¹³ Chamberlain v. Fitch, 2 Cow. 243; Newton v. Harris, 8 Barb. 306.

mittitur is proper whenever any order is made which finally disposes of the appeal, though it may not be an order on the merits.¹

§ 5141. **Amendment.**—But it may be amended by motion in the court above in respect to a clear inaccuracy, as of miscalculation, etc.;² or proceedings may be stayed by the court below on suggestion from the court above, but not otherwise;³ or the *remittitur* might be vacated by the appellate court if irregularly entered, or entered upon false affidavits.⁴

§ 5142. **Costs.**—On a total affirmance or reversal, the costs follow the decision, and the prevailing party is entitled to them.⁵ But when a new trial is ordered, or the judgment modified, the costs of appeal is in the discretion of the court.⁶ The words “with costs” added to the judgment, and annexing to the *remittitur* a copy of the bill of costs, are a sufficient awarding of costs.⁷ The clerk of the superior court may thereupon issue execution for costs and damages.⁸ The court has power of awarding, in addition to the costs upon affirmance, a further sum for damages caused by the delay.⁹ The *remittitur* may order costs of appeal to abide the event of a new trial.¹⁰ Defendants below and appellants here, on the main question, to wit, the injunction, required to pay costs in this court on both appeals.¹¹

§ 5143. **Law of the Case.**—A decision of the supreme court in a case becomes the law of that case in all its future stages,¹² whether the decision be erroneous or not.¹³ And can not on a second appeal be altered or changed, unless the conditions on which it was founded are so changed as to render its accomplishment impracticable.¹⁴ Where there is an intervention in ejectment, and judgment for the plaintiff against both defendant and the intervenor, each of whom take a separate appeal from the judgment and order denying a new trial, the affirmance of

¹ Dresser v. Brooks, 2 N. Y. 559; S. C., 4 How. Pr. 207.

² Palmer v. Lawrence, 5 N. Y. 455; Griswold v. Haven, 26 How. Pr. 170.

³ Jarvis v. Shaw, 16 Abb. Pr. 415; Selden v. Vermilya, 3 Sandf. 683; Bogardus v. Rosendale Manf. Co., 1 Duer, 592.

⁴ Newton v. Harris, 8 Barb. 306.

⁵ White v. Anthony, 23 N. Y. 164.

⁶ Cal. Code C. P., sec. 1027.

⁷ Marysville v. Buchanan, 3 Cal. 212.

⁸ Id.; affirmed in McMillan v. Vischer, 14 Cal. 232; Ex parte Bur-rill, 24 Id. 350.

⁹ Cal. Code C. P., sec. 957.

¹⁰ Marsh v. Benson, 34 N. Y. 358.

¹¹ Jungerman v. Bovee, 19 Cal. 355.

¹² Davidson v. Dallas, 15 Cal. 75; Hubbard v. Sullivan, 18 Id. 508; Nieto v. Carpenter, 21 Id. 455; Table Mt. Tun. Co. v. Stranahan, Id. 548; Moore v. Murdock, 26 Id. 524; Lucas v. San Francisco, 28 Id. 591; Kile v. Tubbs, 32 Id. 332; Argenti v. Sawyer, Id. 414.

¹³ Davidson v. Dallas, 15 Cal. 75; Gunter v. Laffan, 7 Id. 588; Clary v. Hoagland, 6 Id. 685.

¹⁴ Estate of Pacheco, 29 Cal. 224; Mitchell v. Davis, 23 Id. 381.

the judgment and order on the appeal of the defendant does not preclude the supreme court from afterwards reversing both on the appeal by the intervenor, and ordering judgment in his favor.¹ And such decision is conclusive on the rights of the parties, and is not subject to revision;² and is a final adjudication from which the court can not depart, nor the parties relieve themselves.³ The discussion and determination of other points not tending to the decision of the point upon which the appeal was disposed of must be regarded as *dicta*, and not as the law of the case.⁴ The doctrine of the law of the case applies equally to actions of ejectment as to other actions, and without consideration as to the importance of the questions involved.⁵ Where an appeal is taken from an order granting a preliminary injunction, and the order is reversed, the opinion of the court will not apply to any new state of facts which may appear on the record, or an appeal from the final judgment.⁶

§ 5144. **Proceedings Subsequent.**—If the supreme court directs the judgment of the court below to be modified, the court below can not open it so as to change it in any particular than as directed;⁷ nor can the court below refuse to give effect to the judgment of the appellate court.⁸ So also in case of reversal by supreme court of the United States; and if the mandate is filed in the court below its judgment is reversed, even if the lower court denies a motion to make its judgment conform to that of the United States supreme court.⁹ The court below has no authority to prevent the immediate execution of the judgment so remitted.¹⁰ Nor has the lower court the power to modify the judgment so remitted.¹¹

§ 5145. **Restitution.** When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment on

¹ Donner v. Palmer, 45 Cal. 180.

² Dewey v. Gray, 2 Cal. 374; Soule v. Ritter, 20 Id. 522; Leese v. Clark, Id. 387.

³ Phelan v. San Francisco, 20 Cal. 39; Lucas v. San Francisco, 28 Id. 591.

⁴ Mulford v. Estudillo, 32 Cal. 131.

⁵ Leese v. Clark, 20 Cal. 387.

⁶ Trinity Co. v. McCammon, 25 Cal. 119.

⁷ Meyer v. Kohn, 33 Cal. 484.

⁸ McMillan v. Richards, 12 Cal. 467.

⁹ Reynolds v. Hosmer, 45 Cal. 616.

¹⁰ Marysville v. Buchanan, 3 Cal. 212; McMillan v. Richards, 12 Id. 467.

¹¹ Argenti v. San Francisco, 30 Cal. 458; Rogers v. Paterson, 4 Paige Ch. 409; Griswold v. Havens, 16 Abb. Pr. 413; Quackenbush v. Leonard, 10 Paige Ch. 131; McGregor v. Buell, 17 Abb. Pr. 31.

the appeal from which the proceedings were not stayed.¹ Where final judgment is rendered for appellant, the court should exercise the power of restitution.² The power of restitution existing in the supreme court does not exclude the lower courts from exercising the same power.³ This does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed; as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like.⁴ A motion for restitution should be made before the entry of judgment, of which it then becomes a part.⁵

§ 5146. **Stay of Proceedings.**—The presiding judge of the highest court in a state has no power to grant a stay of proceedings on a judgment rendered in that court, until an application can be made to some justice of the supreme court of the United States to issue citation on a writ of error.⁶

CHAPTER VI

APPEALS FROM SUPERIOR COURT TO THE SUPREME COURT IN PROBATE AND OTHER PROCEEDINGS.

§ 5147. **When may be Taken.**—Appeals may also be taken to the supreme court from the superior courts in the following cases: 1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; and in any special cases and proceedings; and in cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; 2. From an order granting or refusing a new trial in the cases designated, and from any special order made after final judgment in such cases.⁷

§ 5148. **In Probate Proceedings.**—An appeal may be taken to the supreme court from a judgment or order of the probate court: 1. Granting or refusing or revoking letters testament-

¹ Cal. Code C. P., sec. 957; Polack v. Shafer, 46 Cal. 270; Pico v. Cuyas, 48 Id. 639; see also Raun v. Reynolds, 18 Id. 276.

² Estus v. Baldwin, 9 How. Pr. 80; see Britton v. Phillips, 24 Id. 111.

³ Reynolds v. Harris, 14 Cal. 667.

⁴ Farmer v. Rogers, 10 Cal. 335.

⁵ Kennedy v. O'Brien, 2 E. D. Smith, 41; Lott v. Swezey, 29 Barb. 87.

⁶ Greely v. Townsend, 25 Cal. 614.

⁷ Cal. Code C. P., sec. 966.

ary, or of administration, or of guardianship; 2. Admitting or refusing to admit a will to probate; 3. Against or in favor of the validity of a will, or revoking the probate thereof; 4. Against or in favor of setting apart property, or making an allowance for a widow or child; 5. Against or in favor of directing the partition, sale, or conveyance of real property; 6. Settling an account of an executor or administrator or guardian; 7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; 8. Granting or overruling a motion for a new trial; 9. Confirming or refusing to confirm a report of an appraiser setting apart the homestead.¹ But an order of the probate court, setting aside a judgment of that court refusing to admit a will to probate, is not appealable;² nor is an order refusing to quash an execution.³ When an executor or administrator who has given an official undertaking appeals from a judgment or order of probate court made in the estate which he represents, his official undertaking stands in the place of an undertaking on appeal, and his sureties thereon are liable.⁴

§ 5149. **Contested Elections.**—The supreme court has jurisdiction on appeal in contested election cases.⁵

§ 5150. **Orders not Appealable.**—No appeal lies from the appointment of a special administrator;⁶ nor from an order setting aside its own proceedings had by the probate court before final order, upon application of the surviving wife for a homestead.⁷ But an order dismissing a petition to have an administrator show cause why an allowed claim should not be paid was held to be appealable.⁸ Appeal does not lie from an order refusing to set aside an order of sale.⁹

§ 5151. **Parties.**—On an appeal from an order removing a guardian of an estate and appointing another guardian in his place, taken by the removed guardian, the newly appointed guardian is a necessary party.¹⁰ Where the probate court settles the basis upon which an account shall be stated, and directs that if the administrator refuses to so state it the creditor shall do so, the error, if any, of ordering the creditors to state the

¹ Cal. Code C. P., sec. 969.

² *Peralta v. Castro*, 15 Cal. 511.

³ *Blum v. Brownstone*, 50 Cal. 293.

⁴ Cal. Code C. P., sec. 970.

⁵ Cal. Code C. P., sec. 1126; *Knowles v. Yates*, 31 Cal. 82; *Day v. Jones*, Id. 261; *Webster v. Byrnes*, 34 Id. 273.

⁶ Cal. Code C. P., sec. 1413.

⁷ *Estate of Johnson v. Tyson*, 45 Cal. 257; see also *Peralta v. Castro*, 15 Id. 511.

⁸ *Estate of McKinley*, 49 Cal. 152.

⁹ *Estate of Smith*, 51 Cal. 563.

¹⁰ *Guardianship etc. of Medbury*, 48 Cal. 83.

account is immaterial on appeal by the administrator;¹ nor can an executor maintain an appeal from an order of distribution on the ground that the distribution is not made in proper proportions, as he has no interest in that question.²

§ 5152. **Transcript.**—On an appeal from a decree of a probate court on a final accounting and settlement, the petition and account filed with a view to the final settlement are a part of the record to be used on appeal.³ The statement must state specifically the particular errors or grounds upon which the appellant intends to rely.⁴

CHAPTER VII.

APPEALS FROM JUSTICES' COURTS, AND OTHER JUDICIAL OR QUASI-JUDICIAL SOURCES, TO SUPERIOR COURTS.

§ 5153. **When Lies.**—Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court may appeal therefrom to the superior court.⁵ Such courts have sole appellate jurisdiction in such cases,⁶ and such appeals are a bar to the remedy by *certiorari*;⁷ but if the time for appeal has elapsed, plaintiff can apply to the superior court for a writ of *certiorari*, and thus review the action of the justice in rendering the judgment, so far as questions of jurisdiction are concerned.⁸

§ 5154. **Appeal, how Taken.**—The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.⁹ But an appeal is not effectual for any purpose unless an undertaking be filed.¹⁰

§ 5155. **Costs.**—One of the conditions upon which an appeal is allowed from justices' courts is the payment of the costs of the action.¹¹ An offer to pay costs as soon as the papers are

¹ Estate of Miner, 46 Cal. 564.

² Estate of Wright, 49 Cal. 550.

³ Estate of Isaacs, 30 Cal. 105.

⁴ Estate of Boyd, 25 Cal. 511.

⁵ Cal. Code C. P., sec. 974.

⁶ People v. Fowler, 9 Cal. 85; Denmark v. Liening, 10 Id. 93; Hunter v. Hoole, 17 Id. 418; Comstock v. Clemens, 19 Id. 77.

⁷ Gray v. Schupp, 4 Cal. 185; Coulter v. Stark, 7 Id. 244; Clary v. Hoagland,

13 Id. 173; People v. Shepard, 28 Id. 115.

⁸ Comstock v. Clemens, 19 Cal. 77; People v. Johnson, 30 Id. 98. As to appeals in special statutory cases, see Burson v. Cowles, 25 Id. 535; People v. Halloway, 26 Id. 651.

⁹ Cal. Code C. P., sec. 974.

¹⁰ Id., sec. 978.

¹¹ McDermott v. Douglass, 5 Cal. 89; Cal. Code C. P., sec. 977.

made out is not a sufficient tender.¹ The justice is not bound to first make out the papers, and then rely on his fees being paid,² but may do so if he so elect,³ and he must make a demand for his fees;⁴ but if he send up his case without receiving his fees, that in itself is not a ground for dismissing the appeal.⁵ A return to an alternative *mandamus* to compel a justice to send up papers on appeal that his fees had not been paid or tendered "prior to the service of the writ" is no defense to making the writ peremptory, as they may have been paid since.⁶

§ 5156. **Dismissal.**—When the appeal is dismissed, because of a failure to prosecute or for want of jurisdiction, costs may be adjudged against the appellant.⁷ And a failure to produce in the superior court a duly certified copy of the justice's docket is a failure to prosecute.⁸ But the appeal can only be dismissed after notice.⁹

§ 5157. **Jurisdiction.**—The objection that a superior court has no jurisdiction in cases of appeal to it from a lower court, where no bond is given as required by statute, should be made in the county court, as the judge thereof, in his discretion, on hearing excuse, might allow appellant to file a bond.¹⁰ So, also, the allowance of an amendment to the complaint is in the discretion of the superior court.¹¹

§ 5158. **New Trial.**—When the appeal is on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court.¹² In case of a judgment by default before the justice no appeal can be had on questions of fact, and there can be no new trial on appeal, nor can questions of law be reviewed unless on a statement.¹³ Superior court may grant a new trial of a case which has been once tried before it on appeal from justice's court; and thereupon it is the duty of the county judge to settle a statement duly presented.¹⁴

§ 5159. **Statement.**—The party appealing, on questions of law alone, shall prepare a statement on appeal within ten days from the rendition of judgment, and file the same with the justice.¹⁵ And the statement must contain the grounds on which

¹ People v. Harris, 9 Cal. 571.

² Id.

³ Lick v. Madden, 25 Cal. 203.

⁴ Id.

⁵ Bray v. Redman, 6 Cal. 287.

⁶ People v. Harris, 9 Cal. 571.

⁷ Blair v. Cummings, 39 Cal. 667.

⁸ People v. Elkins, 40 Cal. 642.

⁹ Id.; Cal. Code C. P., sec. 980.

¹⁰ Howard v. Harman, 5 Cal. 78; .

Coulter v. Stark, 7 Id. 244; see also Blair v. Hamilton, 32 Id. 50.

¹¹ Canfield v. Bates, 13 Cal. 606.

¹² Cal. Code C. P., sec. 976.

¹³ People v. El Dorado Co. Ct., 10 Cal. 19; Funkenstein v. Elgutter, 11 Id. 328.

¹⁴ Cummings v. Irwin, 40 Cal. 354.

¹⁵ Cal. Code C. P., sec. 975; People ex rel. Jones v. County Court of El Dorado, 10 Cal. 19.

appellant intends to rely, and so much of the evidence as may be necessary to explain the grounds, and no more.¹

§ 5160. Notice of Appeal.

Form No. 1164.

[TITLE.]

You will please take notice, that the plaintiff in the above-entitled action hereby appeals to the superior court of the city and county of, from the judgment therein made and entered in the said justice's court, on the day of, 18.., in favor of said defendant, and against said plaintiff, and from the whole of said judgment. This appeal is taken on questions of both law and fact.

[DATE.]

[SIGNATURE.]

To J. P., justice of said justice's court, and G. H., attorney for defendant.

§ 5161. Filing of Notice.—The filing of notice of appeal and undertaking on appeal, in a justice's court, after rendition of the verdict, but before entry of judgment, does not deprive the justice of authority to enter up judgment on the verdict.²

§ 5162. Service of Notice.—The general law regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in justices' courts.³ The record not showing that notice was served, appellant may prove by his affidavit that such notice was in fact served.⁴

§ 5163. Undertaking on Appeal.

Form No. 1165.

[TITLE.]

Know all men by these presents:

That we, A. B., principal; and C. D. and E. F., sureties, are held and firmly bound unto G. H., in the sum of dollars, lawful money of the United States of America, to be paid to the said G. H., [his] executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands, sealed, and dated this day of 18..

The condition of the above undertaking is such, that whereas the said G. H. obtained a judgment against the said A. B.,

¹ Cal. Code C. P., sec. 975; *People ex rel. Jones v. County Court of El Dorado*, 10 Cal. 19; *People v. Freelon*, 8 Cal. 517. See, as to settlement of statement, Cal. Code C. P., sec. 975.

² *Fugitt v. Cox*, 2 Nev. 370.

³ *Welton v. Garibaldi*, 6 Cal. 245.

⁴ *Mendioca v. Orr*, 16 Cal. 368.

before J. P., esq., justice of the peace of the township, in the county of, state of, on the day of, 18..., for dollars, principal sum, and for dollars, costs, and whereas the above-bounden A. B. is desirous of appealing from the decision of said justice to the superior court of the said county of, and a stay of proceedings is claimed: Now, if the above-bounden shall well and truly pay, or cause to be paid, the amount of the said judgment and all costs, and obey any order the said superior court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all costs that may be recovered against the said appellant in the said superior court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue.

[SIGNATURES AND SEALS.]

[AFFIDAVIT OF QUALIFICATION.]

§ 5164. **Amount.**—Undertaking must be in the sum of one hundred dollars, or if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, or twice the value of the property, including costs.¹

§ 5165. **Approval of Justice.**—It is the duty of the justice of the peace, when an appeal bond is presented, to act without delay. If he receives the bond without objection, it will be too late to disapprove it the next day.²

§ 5166. **Bond.**—Where objection is made within the proper time, for want of an undertaking or for insufficiency thereof, it is the duty of the presiding judge to hear the excuse of the party failing to produce it, and if sufficient, to allow him to file a bond,³ or he may be allowed to amend.⁴ If the bond be void or defective, a new bond may be filed on terms.⁵

§ 5167. **Justification.**—The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, the appeal must be regarded as if no undertaking had been given.⁶ The mere filing of an exception to the sufficiency of sureties with the justice is not sufficient.⁷ A party who excepts to the sufficiency of sureties may waive the justification.⁸

¹ Cal. Code C. P., sec. 978.

² People v. Harris, 9 Cal. 571.

³ Howard v. Harman, 5 Cal. 78.

⁴ Cunningham v. Hopkins, 8 Cal.

33.

⁵ Rabe v. Hamilton, 15 Cal. 31.

⁶ Cal. Code C. P., sec. 978.

⁷ Reynolds v. Co. Ct. San Joaquin

Co., 47 Cal. 604.

⁸ Blair v. Hamilton, 32 Cal. 49.

PART THIRTEENTH.

FINAL PROCESS.

CHAPTER I.

EXECUTION.

§ 5168. **Form of Writ.**

Form No. 1166.

[TITLE.]

The people of the state of California, to the sheriff of the county of, greeting:

Whereas, on the day of, 18.., A. B., plaintiff, recovered a judgment in the said superior court of the state of, in and for the county of, against C. D. for the sum of dollars damages, with interest at the rate of per cent per, till paid, together with costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of dollars, lawful money of the United States, as appears to us of record.

And whereas, the judgment roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the county of, and the said judgment was docketed in said clerk's office in the said county, on the day and year first above written.

And the sum of dollars, with interest thereon, is now (at the date of this writ) actually due on said judgment.

Now you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the personal property of said debtor; or, if sufficient personal property of said debtor can not be found, then out of the real property in your county belonging to him, on the day whereon said judgment was docketed in the said city and county, or at any time thereafter, and make return of this

writ within sixty days after your receipt thereof, with what you have done indorsed hereon.

Witness, Hon., judge of the said superior court, at the court-house in the county of this day of, 18..

Attest my hand and the seal of said court, the day and year last above written.

K. L., Clerk.

By O. P., Deputy Clerk.¹

[SEAL OF COURT.]

§ 5169. **Counties.**—No execution can issue upon a judgment rendered against a county.²

§ 5170. **Enforcement of Judgment.**—The court has no power to order the sheriff to levy upon a particular piece of property, even though it decide that such property is not exempt.³ But the court may order the execution of a writ of possession;⁴ or the execution of an order of sale on foreclosure.⁵ An execution must be warranted by the judgment. If it exceed the judgment, it has no validity; therefore to authorize an arrest on execution for fraud, the fraud must be stated in the judgment.⁶ But the mere fact that an execution directs the levy of more money than the judgment calls for does not render the execution void, but only voidable.⁷

§ 5171. **Execution for Deficiency on Sale.**—Five years of limitation, within which an execution for an unsatisfied balance on a foreclosure sale may be taken out, runs from the date when the balance was docketed.⁸ The docketing of a balance remaining due after sale of mortgaged property is not an entry of a new judgment for such balance.⁹ Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died, it was held that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency.¹⁰

§ 5172. **Irregular Issuance.**—An execution not issued in

¹ See Cal. Code C. P., sec. 682.

² When a judgment is rendered against a county, as to duty of supervisors, see *Emery v. Gilman*, 10 Cal. 404.

³ *Fraser v. Thrift*, 50 Cal. 476.

⁴ *Leese v. Clark*, 29 Cal. 665.

⁵ *Société D'Espargnes etc. v. Mc Henry*, 49 Cal. 351.

⁶ *Davis v. Robinson*, 10 Cal. 411.

⁷ *Hunt v. Loucks*, 38 Cal. 372; see Cal. Code C. P., sec. 684.

⁸ *Bowers v. Crary*, 30 Cal. 621.

⁹ *Id.*

¹⁰ *Cowell v. Buckelew*, 14 Cal. 640.

the name of the people, or directed to the sheriff, is amendable, and therefore not void but voidable, and a sale under it is valid.¹ So if it erroneously state the date of the judgment, the sheriff is justified in enforcing it.² The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.³

§ 5173. **Levy, Effect of.**—A levy under an execution, upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient at least to discharge third persons who are liable collaterally or as sureties therefor; and the release of the property from levy thus made, without consent of the parties thus liable, can not revive their liability;⁴ otherwise if the court orders that the judgment be not enforced; there the order releases the levy and the judgment is not satisfied.⁵ In Nevada it has been held that if the judgment creditor became the purchaser at an execution sale, and refused to pay the amount of his bid and the property had to be resold, the first sale was not a satisfaction.⁶

§ 5174. **Levy, how Made.**—A levy on personal property, capable of manual delivery, must be made by taking the property in custody.⁷ A levy may be good as against the defendant in the writ, and not good as to third persons.⁸ As to third persons, there can be no levy when the officer does not know the subject of the levy; as where he stands at the door of a store which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession.⁹ Where judgment debtor owns only an interest in a small well-defined portion of a large tract, a levy upon his interest in the large tract is, at least, extremely irregular.¹⁰

§ 5175. **Return of Sheriff.**—A purchaser at a sheriff's sale does not depend in any respect for his title upon the return of the sheriff. He is only bound to see that there is a judgment which is not void, and an execution which is regular upon its

¹ Hibberd v. Smith, 50 Cal. 511.

see also Barber v. Reynolds, 44 Id.

² Franklin v. Merida, 50 Cal. 289.

519.

³ Gregory v. Ford, 14 Cal. 143. As to relief from irregular issuance and from void execution, consult Ryan v. Daly, 6 Cal. 239; Solomon v. Maguire, 29 Id. 227; Domec v. Stearns, 30 Id. 114.

⁶ Sweeney v. Hawthorne, 6 Nev. 130.

⁷ Dutertre v. Driard, 7 Cal. 549.

⁸ Tafts v. Manlove, 14 Cal. 47.

⁴ People v. Chisholm, 8 Cal. 30; Mulford v. Estudillo, 23 Id. 94.

⁹ Herron v. Hughes, 25 Cal. 563; see, as to levy, Smith v. Randall, 6 Id. 47. Duty of sheriff where the money is in custody of a corporation: Howe v. White, 49 Cal. 658.

⁵ Mulford v. Estudillo, 32 Cal. 131;

¹⁰ Logan v. Hale, 42 Cal. 646.

face, and the acts of the officer may be presumed to be regular,¹ the statute being directory so far as it deals with the manner in which the officer is required to execute the writ.² Moneys collected on execution are usually paid over by the officer before the return of the writ, and the fact of such payment constitutes a part of the return, and if paid, the amount collected and paid over can not be the measure of damages for a subsequent failure to return the writ, where the *gravamen* of the action is the failure to return an execution within the prescribed time.³

§ 5176. **Return, Amendment of.**—Courts should exercise great liberality in allowing sheriffs to amend their returns, so as to make them conform to the true state of facts, and to correct errors and mistakes;⁴ but it can not be amended so as to postpone the rights of creditors attaching subsequently but before the correction.⁵ The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it.⁶

§ 5177. **Return Conclusive.**—A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion;⁷ for the presumptions are in favor of the regularity of the acts of the officers.⁸ Courts can not know an under-officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal.⁹

§ 5178. **Stay of Execution.**—A judge at chambers has authority to order a suspension of proceedings under an execution until a motion before the court to recall or quash it can be heard.¹⁰ If a judgment upon which an execution issues, and the execution itself, are void upon their face, the court has power, on motion, to afford relief, and can arrest the process.¹¹

§ 5179. **When Execution may Issue.**—The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.¹² The statute does not require the docketing

¹ Blood v. Light, 38 Cal. 653.

² Id. 654.

³ Hoag v. Warden, 37 Cal. 523.

⁴ Gavitt v. Doub, 23 Cal. 78.

⁵ Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 Id. 25.

⁶ Low v. Adams, 6 Cal. 277.

⁷ Egery v. Buchanan, 5 Cal. 56.

⁸ Ritter v. Scannell, 11 Cal. 248.

⁹ Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Id. 401.

¹⁰ Sanchez v. Carriaga, 31 Cal. 170.

¹¹ Sanchez v. Carriaga, 31 Cal. 170; see also Mok. Hill etc. Co. v. Woodbury, 10 Id. 188; Isaac v. Swift, Id. 71; Farmer v. Rogers, Id. 335; Logan v. Hillegass, 16 Id. 200; Mattoon v. Eder, 6 Id. 60.

¹² Cal. Code C. P., sec. 681; N. Y. Code, sec. 1375.

of the judgment to precede either the issuing or service of an execution.¹ As soon as the judgment is entered an execution may issue, whether the judgment roll has been made up or not.² Every process which may be required to completely enforce a judgment must be taken within five years after its entry.³ It applies as well to justices' judgments;⁴ and to judgments of foreclosure of mortgage equally with personal judgments;⁵ or for an unsatisfied balance on foreclosure.⁶ The period during which an execution has been stayed by an order of court is not to be excluded from the five years after the lapse of which an order of court was necessary to obtain an execution.⁷

§ 5180. **Who may Issue.**—The clerk can also issue execution for damages and costs.⁸ So where a case is remitted from the supreme court to a district court, the clerk of the latter may issue an execution for the cost accrued thereon, without the order of the district court; nor can the district court prevent the immediate execution of the judgment.⁹

§ 5181. **Writ, how Executed.**—The statute is directory, so far as it deals with the manner in which the officer is required to execute the writ;¹⁰ and hence, although the failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void.¹¹

§ 5182. **Exemption from Execution a Personal Right.**—The exemption of property from sale on execution is a personal right, which the debtor may waive or claim at his election.¹²

§ 5183. **Household Furniture.**—The fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family is no objection. Such a construction of the statute would be too narrow.¹³

§ 5184. **Life Insurance Policy.**—The party claiming that a life insurance policy, under the statute of this state, is exempt from execution, must show that the policy was issued by a com-

¹ *Hastings v. Cunningham*, 39 Cal. 137.

² *Sharp v. Lumley*, 34 Cal. 611.

³ *Bowers v. Crary*, 30 Cal. 621.

⁴ *White v. Clark*, 8 Cal. 513.

⁵ *Stout v. Macy*, 22 Cal. 647.

⁶ *Bowers v. Crary*, 30 Cal. 621.

⁷ *Solomon v. Maguire*, 29 Cal. 227.

⁸ *McMillan v. Vischer*, 14 Cal. 232.

⁹ *City of Marysville v. Buchanan*, 3 Cal. 213. See, as to issuance in another county, *People v. Doe*, 31 Id. 220.

¹⁰ *Smith v. Randall*, 6 Cal. 50;

Webber v. Cox, 6 Mon. 110; *Hayden v. Dunlap*, 3 Bibb. 216.

¹¹ *San Francisco v. Pixley*, 21 Cal. 59; *Blood v. Light*, 38 Id. 649. See Cal. Code C. P., 691.

¹² *Borland v. O'Neal*, 22 Cal. 504. As to what property is exempt from execution, see Cal. Code C. P., sec. 690; and also as to exemption of homestead, Cal. Civil Code, sec. 1240.

¹³ *Haswell v. Parsons*, 15 Cal. 266. As to when exemption may be claimed: Id.; see Cal. Code C. P., sec. 690, subd. 2.

pany incorporated under the laws of this state, and that the benefits which he expects to derive from the policy are such as might have been secured by the payment of annual premium not exceeding five hundred dollars.¹ And an endowment policy is an insurance on life, within the sense of the statute. Under the California code of civil procedure, section 690, subdivision 10, as amended in 1877-8, the exemption applies to policies in all life insurance companies, whether incorporated under the laws of this state or not, if the annual premiums do not exceed five hundred dollars.

§ 5185. **Teams, Teamsters, Etc.**—A teamster in the sense of the statute is one engaged in the business of teaming or hauling freight for other persons for a consideration, by which he habitually supports himself and family, if he has one. While he need not drive his team in person, he must be personally engaged in the business, and for the purpose of making a living. One who occupies his time in some other business or calling, and purchases a team and also carries on the business of teaming by the employment of others, is not a teamster in the sense of the statute.² The horses, etc., exempt to a farmer do not include a stallion kept for the service of mares.³ But a wagon and horses which are exempt are none the less so because the debtor owns an undivided interest in common with a stranger.⁴

§ 5186. **Property in Third Person—Estate in Land.**—The purchaser of real estate at execution sale, both before and after the period for redemption expires, has an estate in the land purchased, which may be levied on and sold on an execution running against his property.⁵

§ 5187. **Joint Property.**—Where the execution debtor owns property jointly with another, a sheriff, who has such execution, has the right to levy on such property, and take it into possession for the purpose of subjecting it to sale.⁶

§ 5188. **Liability of Sheriff.**—Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond.⁷

¹ Briggs v. McCullough, 36 Cal. 542.

² Brusie v. Griffith, 34 Cal. 306.

³ Robert v. Adams, 38 Cal. 383.

⁴ Servanti v. Lusk, 43 Cal. 238.

⁵ Page v. Rogers, 31 Cal. 293. See, as to levy on pre-emption claim, Kenyon v. Quinn, 41 Id. 325.

⁶ Waldman v. Broder, 10 Cal. 378. As to property not segregated, see Adams v. Gorham, 6 Cal. 68; see

also Bernal v. Hovious, 17 Id. 542; Jones v. Thompson, 12 Id. 196. Cases where title to property was held to be in third person by assignment and otherwise: See Swanston v. Sublette, 1 Cal. 123; Bryan v. Sharp, 4 Id. 351; Eldridge v. See Yup Co., 17 Id. 44; Peterie v. Bugbey, 24 Id. 423.

⁷ Van Pelt v. Littler, 14 Cal. 194; 30 Id. 190; Markley v. Rand, 12 Id. 275.

§ 5189. **Money in Bank.**—Where negotiable certificates of deposit have been issued to the depositor, there is nothing left in the possession of the bankers belonging to the depositor upon which an attachment issued against his property can fasten.¹

§ 5190. **Pledgee.**—While the interest of the pledgor may be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge.²

§ 5191. **Property in Custody of the Law.**—Property in the custody of the law is not liable to seizure without an order from the court having charge thereof.³ A sheriff can not levy upon money in his own hands belonging to the judgment debtor, when he has received the money on an execution in favor of this debtor.⁴ But, it seems, funds in the hands of a receiver, in a suit for dissolution, are subject to attachment at any time before a final decree of dissolution and distribution.⁵

§ 5192. **Property Which may and may not be Levied on—Choses in Action.**—Things in action are such property as may be levied upon on execution.⁶

§ 5193. **Coin.**—Coin held in the hand, like a horse held by the bridle, may be levied upon.⁷

§ 5194. **Counties, Suits against.**—An execution levied upon a county's revenues in the hands of the treasurer is illegal and void.⁸ The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county.⁹

§ 5195. **Contingent Interests.**—Contingent and complicated contracts can not be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy, and announced at the sale.¹⁰

§ 5196. **Firm Property.**—The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners.¹¹ But the interest which passes by the sale is only the interest of the debtor

¹ *McMillan v. Richards*, 9 Cal. 365.

² *Treadwell v. Davis*, 34 Cal. 691.

³ *County of Yuba v. Adams*, 7 Cal. 35.

⁴ *Clymer v. Willis*, 3 Cal. 363.

⁵ *Adams v. Woods*, 9 Cal. 24.

⁶ *Adams v. Hackett*, 7 Cal. 187; *Davis v. Mitchell*, 34 Id. 81; see also

Donohoe v. Gamble, 38 Id. 340, and *Crandall v. Blen*, 13 Id. 15.

⁷ *Green v. Palmer*, 15 Cal. 411.

⁸ *Gilman v. Contra Costa County*, 8 Cal. 52.

⁹ *Emeric v. Gilman*, 10 Cal. 404.

¹⁰ *Crandall v. Blen*, 13 Cal. 15.

¹¹ *Jones v. Thompson*, 12 Cal. 191.

partner in the residuum of the partnership property, after the settlement of the partnership debts.¹ The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property, as against firm creditors who have not yet obtained judgment.² But the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein.³

§ 5197. **Franchises.**—A ferry license, being a franchise, is not the subject of levy and sale under execution.⁴ Now, by the California civil code, section 388, the franchise of a corporation is subject to execution, though formerly it was not.⁵

§ 5198. **Mining Interest.**—The interest of a miner in his mining claim is property, and may be taken and sold under execution.⁶ The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure.⁷

§ 5199. **Promissory Note.**—A promissory note is liable to seizure and sale under execution against the holder and payee. By such a sale, the purchaser takes the note upon the same terms upon which he would have taken it had it come into his hands in the ordinary course of business.⁸

§ 5200. **Sale under Execution, how Conducted.**—All sales of property under execution must be made at auction to the highest bidder, and shall be made between the hours of nine in the morning and five in the afternoon; after sufficient property has been sold to satisfy execution, no more can be sold.⁹

§ 5201. **Notice of Sale.** Before the sale of property in execution, notice thereof must be given by the sheriff.¹⁰ Although the officer neglects to give the notice, the sale shall not be void.¹¹ But the officer shall in that event forfeit five hundred dollars to the aggrieved party, in addition to his actual damages.¹²

§ 5202. **Order of Sale must Issue.**—A sheriff has no authority to make sale of mortgaged premises under a judgment

¹ Robinson v. Tevis, 38 Cal. 611.

² Conroy v. Woods, 13 Cal. 631.

³ Jones v. Thompson, 12 Cal. 191.

⁴ Thomas v. Armstrong, 7 Cal. 286.

⁵ See Wood v. Truckee Turnpike Co., 24 Cal. 474. As to manner of sale and redemption, etc., see Cal Civil Code, secs. 388-393.

⁶ McKeon v. Bisbee, 9 Cal. 137.

⁷ Halsey v. Martin, 22 Cal. 645.

⁸ Davis v. Mitchell, 34 Cal. 81.

⁹ Cal. Code C. P., sec. 694; Smith v. Randall, 6 Cal. 47; Tuolumne Redemption Co. v. Sedgwick, 15 Id. 515. As to sale in mass of real estate being void: San Francisco v. Pixley, 21 Id. 56.

¹⁰ As to form and sufficiency of notice see Cal. Code C. P., sec. 692.

¹¹ Smith v. Randall, 6 Cal. 47; Harvey v. Fisk, 9 Id. 93.

¹² Cal. Code C. P., sec. 693; see Askew v. Ebberts, 22 Cal. 263.

of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands.¹ If the first order of sale on a foreclosure decree be not executed, a second order may issue,² or an execution may issue on personal property of defendant, where a personal judgment is also taken.³ A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate.⁴

§ 5203. **Real Property, Certificate of Sale.**—The officer shall give to the purchaser a certificate of the sale, containing: 1. A particular description of the real property sold; 2. The price bid for each distinct lot or parcel; 3. The whole price paid; 4. When subject to redemption, it must be so stated. And when the judgment is made payable in a specific kind of money or currency, the certificate shall state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment, a duplicate of which certificate shall be filed with the recorder of the county.⁵ The purchaser is substituted to, and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In other cases it is subject to redemption.⁶

§ 5204. **Resale of Property.**—If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property, at any time, to the highest bidder, and if any loss be occasioned thereby the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. Where the judgment creditor becomes the purchaser, and refuses to pay it, it is error for the court to order a satisfaction of the judgment.⁷

¹ Heyman v. Babcock, 30 Cal. 367.

² Shores v. Scott River Water Co., 17 Cal. 626.

³ Englund v. Lewis, 25 Cal. 357. That a personal judgment may be entered in connection with the decree, see Comerais v. Genella, 22 Id. 116. As to delivery of personal property, see Cal. Code C. P., secs. 698 and 699. Assignment of judgment under sheriff's sale: Fore v. Maulove, 18 Cal. 436. Duty of ex-sheriff, and in case of his death, see People v. Boring, 8 Id. 406.

⁴ Lay v. Neville, 25 Id. 551.

⁵ Cal. Code C. P., sec. 700.

⁶ Id.; see Moore v. Martin, 38 Cal. 428; McMillan v. Richards, 9 Id. 365;

Cloud v. El Dorado Co., 12 Id. 128; Clark v. Lockwood, 21 Id. 220; People v. Doe, 31 Id. 220; Page v. Rogers, Id. 293; People v. Mayhew, 26 Id. 655; Baber v. McLellan, 30 Id. 135; Steinbach v. Leese, 27 Id. 297; see also Bickerstaff v. Doub, 19 Id. 109.

⁷ Sweeney v. Hawthorne, 6 Nev. 129; Cal. Code C. P., sec. 695. As to rights of purchaser, see People v. Hays, 5 Cal. 66; Williams v. Smith, 6 Id. 91; Harvey v. Fisk, 9 Id. 93. For equitable relief, see Goodenow v. Ewer, 16 Id. 461; Webster v. Haworth, 8 Id. 21. As to the doctrine of *caveat emptor*, see Boggs v. Hargrave, 16 Id. 559; Webster v. Haworth, 8 Id. 21; see also Johns v. Trick, 22 Id. 511.

§ 5205. **Reversal on Appeal, Effect of.**—A judgment un-reversed and not suspended may be enforced, but when reversed it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back;¹ and property or advantages must be restored.²

§ 5206. **Sale in Parcels.**—The well-established rules of equity proceedings require, in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second.³ Tracts levied on separately must not be sold in mass, and if so sold, the creditor may move to set aside the sale, even though a stranger becomes the purchaser.⁴

§ 5207. **Setting Aside Sale.**—The purchaser at sheriff's sale is entitled to notice of motion to set it aside, and personal service is not exhausted even if absent from the state.⁵ Where the property sold does not belong to the judgment debtor the case comes within the provision of the California code of civil procedure, section 708, and the judgment may be revived.⁶

§ 5208. **Sheriff's Deed.**—If no redemption be made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated, and he is restored to his estate.⁷ A deed executed by the sheriff immediately after the sale, without waiting the statutory time, is void.⁸ Sheriff's deed need not recite the judgment and execution under which he acted, it is sufficient if it recites enough to show the authority of the sheriff to sell.⁹

§ 5209. **Title Acquired by Sale.**—The statute of Califor-

¹ Raun v. Reynolds, 18 Cal. 275.

² Reynolds v. Harris, 14 Cal. 680.

³ Raun v. Reynolds, 11 Cal. 14.

⁴ Browne v. Ferrea, 51 Cal. 552.

⁵ Eckstein v. Calderwood, 34 Cal. 658. As to the rights of purchaser, on motion to set aside sale for irregularity, see Cal. Code C. P., sec. 708.

⁶ Cross v. Zane, 47 Cal. 602. As to the revival of judgments and proceedings therefor, see Humiston v. Smith, 21 Id. 129; consult also Boggs v. Hargrave, 16 Id. 566; and Burton v. Lies, 21 Id. 88.

⁷ Cal. Code C. P., sec. 703.

⁸ Gross v. Fowler, 21 Cal. 392; Bernal v. Gleim, 33 Id. 668.

⁹ Clark v. Sawyer, 48 Cal. 133; Montgomery v. Robinson, 49 Id. 258. As to effect of sheriff's deeds and certificates of sale, see the following cases: Anthony v. Wessel, 9 Id. 103; Knight v. Fair, Id. 117; Tuolumne Redemp. Co. v. Sedgwick, 15 Id. 515; McCarty v. Christie, 13 Id. 81; Lewes v. Thompson, 3 Id. 266; Mills v. Suckey, 22 Id. 373; Donahue v. McNulty, 24 Id. 411; People v. Doe, 31 Id. 220; Hutchings v. Ebeler, 46 Id. 557.

nia, in providing that until a levy property shall not be affected by the execution,¹ has gone further than the English statute, and has entirely obviated the evils of the common-law rule.² So in the case of personal property, the title transferred by the sale can not antedate the day of sale, as against *bona fide* purchasers, where the seizure was made only on the day of sale;³ so in case of land, the title dates from the docketing of judgment as against third persons, and not from the date of any real or pretended statutory levy.⁴ A mortgagor, after the sale, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed; but no right to despoil the property of its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor;⁵ such as the engine and boilers, etc., used in a flour-mill.⁶

§ 5210. **Title, Character of.**—The purchaser of a judgment on sale under execution and levy takes as assignee only, assuming that a judgment is the subject of levy and sale. The sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner.⁷

§ 5211. **Title, on What It Depends.**—The purchaser's title in no respect depends upon the return, but upon the judgment, sale, and deed.⁸ The title of a purchaser, under a sale on a decree of foreclosure, can not be impeached in a collateral action for irregularity in the proceedings on the sale.⁹

§ 5212. **Redemption after Sale—Payments, how Made.** The payment in case of redemption may be made to the purchaser or redemptioner, or for him to the officer who made the sale, when the judgment has been made payable in a specified kind of money or currency; and a tender of the money is equivalent to payment.¹⁰ Payment can not be made in certified checks.¹¹ Where a particular currency is not specified, legal-tender notes are sufficient.¹²

§ 5213. **Proceedings on Redemption.**—The redemptioner must produce a copy of the docket of judgment, certified by the

¹ Cal. Code C. P., sec. 688.

² Blood v. Light, 38 Cal. 657.

³ Allentown Bank v. Beck, 49 Pa. St. 409.

⁴ Blood v. Light, 38 Cal. 657.

⁵ Sands v. Pfeiffer, 10 Cal. 258

⁶ Id.

⁷ Fore v. Manlove, 18 Cal. 436.

⁸ Cloud v. El Dorado Co., 12 Cal. 128; Clarke v. Lockwood, 21 Id. 220; More v. Martin, 38 Id. 428.

⁹ Nagle v. Macy, 9 Cal. 426; consult Hayes v. Shattuck, 21 Id. 51; Boggs v. Hargrave, 16 Id. 566; Burton v. Lies, 21 Id. 88.

¹⁰ Cal. Code C. P., sec. 704.

¹¹ People v. Hays, 4 Cal. 127.

¹² People v. Mayhew, 26 Cal. 655.

As to who may receive redemption money, see People v. Boring, 8 Id. 406; Baber v. McLellan, 30 Id. 135; People v. Mayhew, 26 Id. 655.

clerk; or a note of the record of a mortgage or lien certified by the recorder;¹ and if an assignee, a copy of the assignment necessary to establish his claim,² and an affidavit by himself or his agent, showing the amount then actually due on the lien.³ But these requirements do not apply to the judgment debtor; he may redeem without the production of such credentials;⁴ and during the time for redemption the court may restrain waste.⁵

§ 5214. **Sale of Equity of Redemption.**—The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof, until foreclosure and sale, to a creditor, can not operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by a foreclosure.⁶

§ 5215. **Redemption, how Effected.**—The judgment debtor or redemptioner may redeem the property from the purchaser at any time within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.⁷

§ 5216. **Subsequent Redemption.**—If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent thereon in addition, and the

¹ Cal. Code C. P., sec. 705, subd. 1; *Haskell v. Manlove*, 14 Cal. 54.

² Cal. Code C. P., sec. 705, subd. 2; *Reynolds v. Harris*, 14 Cal. 667.

³ Cal. Code C. P., sec. 705, subd. 3.

⁴ *Yoakum v. Bower*, 51 Cal. 539.

⁵ Cal. Code C. P., sec. 706. As to the rents and profits intermediate the sale and final redemption, see *Id.*, sec. 707; *Guy v. Middleton*, 5 Cal. 392; *Reynolds v. Lathrop*, 7 Id. 43; *McDevitt v. Sullivan*, 8 Id. 592; *Harris v. Reynolds*, 13 Id. 514; *Kelsey v. Abbott*, Id. 609; *Knight v. Truett*, 18 Id. 113; *Kline v. Chase*, 17 Id. 596; *Whitney v. Allen*, 21 Id. 233; *Shores v. Scott River Co.*, Id. 135; *Henry v. Evarts*, 30 Id. 425; *Mayo v. Woods*, 31 Id. 269; *Page v. Rogers*, Id. 293; see also *Frink v. Le Roy*, 49 Id. 315.

⁶ *Dewey v. Latson*, 6 Cal. 609. As to relative rights of parties thereunder, consult *Montgomery v. Tutt*, 11 Id. 307; *McMillan v. Richards*, 9 Id. 365; *McDermott v. Burke*, 16 Id. 580; *Harlan v. Smith*, 6 Id. 173; *Cowing v. Rogers*, 34 Id. 648; *Goodenow v. Ewer*, 16 Id. 461; *Alexander v. Greenwood*, 24 Id. 506; *Bludworth v. Lake*, 33 Id. 255, 265.

⁷ Cal. Code C. P., sec. 702. Months as used in the statute defined: *Gross v. Fowler*, 21 Cal. 392. As to taxes, see *Seale v. Doane*, 17 Id. 476. As to interest: *McMillan v. Vischer*, 14 Id. 232; *Kirkham v. Dupont*, Id. 559. Estate, in whom vested: *McMillan v. Richards*, 9 Id. 365; *Anthony v. Wessel*, Id. 103. Excessive payment not compulsory: *McMillan v. Vischer*, 14 Id. 235.

amount of any assessment or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest. The property may be successively redeemed as often as a redemptioner is so disposed, on the above terms. Notice of redemption shall be given to the sheriff.¹ If a redemptioner redeem, and no redemption be made from him within sixty days, his right to the sheriff's deed is absolute.²

§ 5217. **Who may Redeem.**—Property sold subject to redemption, or any part sold separately, may be redeemed in the manner provided, by the following persons, or their successors in interest: 1. The judgment debtor, or his successor in interest, in the whole or any other part of the property; 2. A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.³ The judgment debtor may redeem from an execution sale, notwithstanding he has conveyed his interest to another in the property sold.⁴

§ 5218. **Undertaking of Indemnity to Sheriff.**

Form No. 1167.

Know all men by these presents:

That we, J. R. as principal, and L. M. and N. O. as sureties, are held and firmly bound unto R. S., sheriff of the county of, in the sum of dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of 18..

Whereas, under and by virtue of a writ of execution, issued out of the court of the county of, in an action wherein the said J. R. was plaintiff and C. D. was defendant, against said defendant, directed and delivered to

¹ Cal. Code C. P., sec. 703.

² Boyle v. Dalton, 44 Cal. 332.

³ Cal. Code C. P., sec. 701.

⁴ Yoakum v. Bower, 51 Cal. 540.
Statute defined: Guy v. Middleton, 5 Id. 392; Seale v. Mitchell, Id. 401; Tuol. Redemp. Co. v. Sedgwick, 15 Id. 515; McMillan v. Richards, 9 Id.

365. As to rights of redemption: Raun v. Reynolds, 11 Id. 20; Montgomery v. Tutt, Id. 317; Frink v. Murphy, 21 Id. 108; Grattan v. Wiggins, 23 Id. 16; People v. Mayhew, 26 Id. 655; Whitney v. Higgins, 10 Id. 547; Gamble v. Voll, 15 Id. 510; Daubenspeck v. Platt, 22 Id. 330.

said R. S., sheriff of the county of, the said sheriff was commanded to satisfy the judgment in said action, with interest, out of the personal property of such defendant within his county not exempt from execution; and if sufficient personal property could not be found, then out of the real property belonging to on the day when the said judgment was docketed, or at any time subsequently, the said sheriff did thereupon levy upon and take into his possession the following-described goods and chattels.

[DESCRIPTION.]

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, P. Q. claimed the said goods and chattels as his property; and thereupon a jury was summoned by the said sheriff to try such claim, which said jury have by their finding decided in favor of said claimant. And whereas the said plaintiff, notwithstanding such finding, requires of said sheriff that he shall retain said property under such levy and in his custody.

Now, therefore, the condition of this obligation is such, that if the said L. M. and N. O., their heirs, executors, and administrators, shall well and truly indemnify and save harmless the said sheriff, his heirs, executors, administrators, and assigns, of and from all damages, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his heirs, executors, administrators, or assigns, shall sustain, or in any wise be put to, for or by reason of the levy, taking, sale, or retention by the said sheriff, in his custody, under said execution, of the said property claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue.

* [SIGNATURES AND SEALS.]

[AFFIDAVIT OF QUALIFICATION.]

§ 5219. **Proceedings.**—If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility.¹ An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right.² In a suit against the sheriff for not levying the execution, if the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he tendered the bond of indemnity to the sheriff required by law.³

§ 5220. **Verdict, Effect of.**—A sheriff is not protected in

¹ Davidson v. Dallas, 8 Cal. 227.

² Stark v. Raney, 18 Cal. 622.

³ Strong v. Patterson, 6 Cal. 156; see Cal. Code C. P., sec. 689.

the sale of personal property by the verdict of a jury on the trial of the right of property, under the provisions of section 218 of the code.¹ The proceedings before a sheriff in such a trial are not judicial.²

§ 5221. **Writ of Possession.**

Form No. 1168.

[TITLE.]

The people of the state of California, to the sheriff of the county of, greeting:

Whereas, on the day of, 18.., A. B., plaintiff, recovered a judgment in the said superior court of the state of in and for the county of, against C. D., defendant, for the possession of certain premises in said judgment and decree and hereinafter more particularly described, and also for the sum of dollars, damages for the detention of said premises, besides the sum of dollars, costs and disbursements, as appears to us of record.

And whereas, the judgment roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the county of, and the said judgment was docketed in said clerk's office, in the said county, on the day and year first above written.

Now, therefore, you, the said sheriff, are hereby commanded and required to place the said A. B. in the quiet and peaceable possession of the lands and premises in said judgment and decree described, as follows, to wit.

[DESCRIPTION.]

And whereas, the sums of dollars, damages, and dollars, costs, are now (at the date of this writ) actually due on said judgment.

You, the said sheriff, are hereby further required to make the said sums due on the said judgment, for damages and costs, and all accruing costs, to satisfy the said judgment, out of the personal property of said debtor, C. D., or if sufficient personal property of said debtor can not be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the said county or at any time thereafter; and make return of this writ within days after your receipt hereof, with what you have done indorsed hereon.

Witness, Hon., judge of the said superior court, at the

¹ Cal. Code C. P., sec. 689.

189; *Sheldon v. Loomis*, 28 Id.

² *Perkins v. Thornburgh*, 10 Cal. 122.

court-house in the county of, and the seal of said court, this day of, 18..

[SEAL.]

[SIGNATURE OF CLERK.]¹

§ 5222. **Order for Writ of Assistance.**

Form No. 1169.

[TITLE.]

On reading and filing the affidavit of P. Q., setting forth that he was the purchaser of the premises described in the complaint herein, that he has presented to the defendant C. D. the sheriff's deed for said property, and demanded possession thereof, and that said C. D. has refused to deliver to him possession of said premises, and it appearing that due notice has been given of this motion to Messrs., the attorneys of said defendant; now, on motion of, on behalf of said P. Q., it is ordered that a writ of assistance issue to the sheriff of county, to put the said P. Q. in possession of the said premises, and him in the possession thereof from time to time to maintain and defend.

§ 5223. **Writ of Assistance.**

Form No. 1170.

[TITLE.]

The people of the state of California, to the sheriff of the .
county of, greeting:

Whereas, by a certain decree or judgment of our superior court of the state of in and for the county of, in a certain action there pending between A. B., plaintiff, and C. D., defendant, made at a term of said court, held at, in the county of, on the day of, 18.., in and for the county of, before the Hon., judge of the said court, it was, among other things therein contained, adjudged and decreed by the said court that the purchaser at the sale therein described should, on the production of the sheriff's deed for said premises, be forthwith put in possession of a certain piece or parcel of land situate in the said county of, state of, and therein described as follows, to wit [describe premises].

And whereas, time for redemption has expired, and the said sheriff's deed has been duly executed and delivered to C. L., who was the purchaser at said sale, yet the said C. L. has not

¹ Where L. and P. entered into possession of certain lands under neither of the parties to an action for the possession of the same, and were not parties to said action, they can not be

dispossessed under a writ issued on a judgment rendered for plaintiff therein: *Rogers v. Parish*, 35 Cal. 127; *Mayo v. Sprout*, 45 Id. 99.

been let into nor taken possession of the said piece of land, or of any part thereof, according to the tenor of the said decree; and whereas, the said piece of land is in the tenure and occupation of R. D.; and whereas, by an order of said court made in the said action on the day of, 18.., it was ordered that our writ of assistance should issue to you, the said sheriff, to put the said C. L. in possession of the said piece or parcel of land, and him in possession thereof from time to time to maintain and defend:

Therefore, we command you, that immediately after receiving this writ, you go to and enter upon the said piece or parcel of land, and that you eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said C. L., and that you put and place the said C. L. or his assigns in the full, peaceable, and quiet possession of the said piece or parcel of land, without delay, and him, the said C. L., in such possession thereof from time to time maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of the said decree and order of the said court.

Witness, Hon., judge of the said superior court, at, in the county of, and the seal of said court, this day of, 18..

R. S., Clerk.

By N. O., Deputy Clerk.

[SEAL.]

§ 5224. **Against Whom Issued.**—A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree.¹ *Prima facie*, all who come into possession of the land pending the action to recover possession must go out under the writ of possession, if the plaintiff recovers, for the presumption is that they came in under the defendant.² If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained.³ If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at

¹ *Burton v. Lies*, 21 Cal. 87. Consult on this subject, *Harlan v. Rack-erby*, 24 Id. 561; *Sampson v. Ohleyer*, 22 Id. 200; *Skinner v. Beatty*, 16 Id. 156; *S. B. L. A. v. Christy*, 41 Id. 501.

² *Wetherbee v. Dunn*, 36 Cal. 147; *Leese v. Clark*, 29 Id. 664.

³ *Wetherbee v. Dunn*, 36 Cal. 147.

the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused.¹

§ 5225. **Object of Writ.**—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed.² On a motion for a writ of assistance, questions of equitable cognizance between the parties in possession of the land who were not parties to the foreclosure suit, and the plaintiff, as to their respective rights, can not be litigated.³ In executing the writ, it is the duty of the sheriff to place the purchaser of an estate in common in possession of every part of the land jointly with the other tenants in common. But he can not remove any tenant in common who holds title from an independent source.⁴

§ 5226. **Power of Judge to Grant.**—Prior to the passage of the California act of May 18, 1861, judges of courts had no power to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same.⁵

§ 5227. **Proceedings Requisite.**—All that is requisite to obtain a writ of assistance, as against the parties and those claiming, with notice, under them, after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it.⁶ Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree; and if, upon its service, that is disregarded, the court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ, as against the defendant in the suit.⁷

§ 5228. **Setting Aside Writ.**—If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession.⁸

¹ Steinbach v. Leese, 27 Cal. 297.

² Montgomery v. Tutt, 11 Cal. 190; Reynolds v. Harris, 14 Id. 677.

³ Henderson v. McLucker, 45 Cal. 647.

⁴ Tevis v. Hicks, 38 Cal. 234.

⁵ Chapman v. Thornburg, 23 Cal. 48; see also People v. Doe, 31 Id. 220.

⁶ Montgomery v. Middlemiss, 21 Cal. 103.

⁷ Montgomery v. Tutt, 11 Cal. 190; Reynolds v. Harris, 14 Id. 677.

⁸ Skinner v. Beatty, 16 Cal. 156; City of San José v. Fulton, 45 Id. 316.

§ 5229. **Who Entitled.**—*Prima facie*, plaintiff in a foreclosure suit is entitled after sale of the premises and sheriff's deed to him to a writ of assistance, as against the mortgagor and those entering under him subsequent to the decree, if they refuse to surrender possession.¹ So the purchaser under a decree of foreclosure is entitled to a writ of assistance.² The writ should not issue in favor of a purchaser from the sheriff's grantee on a tax sale; it can only issue in favor of the grantee of the sheriff.³ Where the sheriff's grantee holds as trustee for another party the writ should not issue in case of controversy.⁴

¹ Skinner v. Beatty, 16 Cal. 156.

² People v. Grant, 45 Cal. 97; City

³ Montgomery v. Middlemiss, 21 of San José v. Fulton, Id. 316.

⁴ Id.

PART FOURTEENTH.

SPECIAL PROCEEDINGS.

CHAPTER I.

AGAINST JOINT DEBTORS.

§ 5230. **In General.**—Parties who were not originally served with the summons, and did not appear in the action, may be summoned after judgment, to show cause why they should not be bound in the same manner as though originally served.¹ The summons in such cases must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time as the original summons.² It is not necessary to file a new complaint.³ The summons must be accompanied by an affidavit that the judgment or some part thereof remains unsatisfied, specifying the amount due.⁴ A part payment of a demand by one of two debtors will not discharge such debtor, making the payment from the payment of the balance; his obligation is to pay the whole.⁵ The defendant may answer denying the judgment, or setting up any defense which may have arisen subsequently, or he may deny his liability upon the original obligation, except a discharge by the statute of limitations.⁶ In Illinois, the remedy is by *scire facias*, under the common law.⁷ And a *scire facias* may be issued after it is found that the judgment can not be col-

¹ Cal. Code C. P., sec. 989.

² Id., sec. 990.

³ Id.

⁴ Id., sec. 991.

⁵ Griffith v. Grogan, 12 Cal. 317.

⁶ Cal. Code C. P., sec. 992.

⁷ For proceedings in such cases, con-

sult Puterbaugh's Common Law Pleading and Practice, 685; Marshall v. Maury, 1 Scam. 231; McFadden v. Fortier, 20 Ill. 509. That a *scire facias* is not an original action, consult Tiffany v. Breese, 3 Scam. 499, 547.

lected of the one against whom it was rendered.¹ Where in an action against two defendants as joint debtors the summons is served on one only, and no appearance is entered for the other, the judgment should be entered against both defendants, but directing the amount to be made of the joint property of both, and the individual property of the person served.² Where the same judgment has passed in one action against two or more parties, they are, in respect to such judgment, joint debtors.³ This remedy is not cumulative, but is substituted for the former practice allowing a new action.⁴ It does not alter any fundamental principle of law as to the joint liability of contractors, but is merely intended to alter the common law in a point of practice.⁵ The summons can not be issued on a judgment of the marine or district court (in New York), although it has been docketed in the county clerk's office.⁶

§ 5231. **Affidavit against Joint Debtor not Served.**

Form No. 1171.

[TITLE OF COURT.]

A. B., Plaintiff,
 against
C. D. and E. F., Defendants. }

[VENUE.]

A. B., being duly sworn, says that he is the plaintiff above named; that on the day of, 18.., he recovered a judgment in the superior court of the state of California, in and for the county of, against the said defendants, C. D. and E. F., for the sum of dollars damages, and dollars costs of suit; which judgment was duly given and made by said court, and entered and docketed by the clerk thereof, to be enforced against the joint property of the said C. D. and E. F., and the separate property of the said E. F.; that afterwards, on the day of, 18.., an execution was issued thereon and delivered to the sheriff of said county of, and upon which there was made the sum of dollars [or that nothing was made

¹As to the mode of proceedings against joint debtors in the state of New York, see N. Y. Code of Procedure, sec. 136. Where judgment has been entered under section 136, see *Foster v. Wood*, 1 Abb. Pr., N. S., 150; against debtor not served, see N. Y. Code, sec. 375-381, which corresponds with the remedy in California: See *Dean v. Eldridge*, 29 How. Pr. 218. That a judgment against joint debtors may be enforced by supplementary proceedings, see *Van Clief*

v. Sickles, 5 Paige Ch. 505; *Commercial Bank etc. v. Meach*, 7 Id. 448; *Emery v. Emery*, 9 How. Pr. 130; *Jones v. Lawlin*, 1 Sandf. 722.

²*Northern Bank of Kentucky v. Wright*, 5 Robt. 604; but *contra*, see *Tay v. Hawley*, 39 Cal. 96.

³*Barnes v. Smith*, 16 Abb. Pr. 420.

⁴*Lane v. Salter*, 4 Robt. 239.

⁵*Niles v. Battershall*, 2 Robt. 146.

⁶*Ticknor v. Kennedy*, 4 Abb. Pr., N. S., 417.

thereon, as the case may be] over and above the costs and fees of the said sheriff upon said execution; that the said judgment remains in full force, and not vacated, annulled, or reversed, and there is now due and unpaid thereon the sum of dollars, and interest on said sum from the day of, 18.., at the rate of per cent per annum; that in said action, in which said judgment was obtained as aforesaid, service of the summons was made upon the said E. F., but not upon the said C. D., and he makes this affidavit in a proceeding against the C. D. under the statute in such case made and provided, to require him to show cause why he should not be bound by the said judgment.

[JURAT.]

[SIGNATURE.]

§ 5232. **Summons against Joint Debtor to Show Cause, etc.**

Form No. 1172.

[TITLE.]

The people of the state of California send greeting: To C. D., defendant.

You are hereby summoned and required to show cause within ten days (exclusive of the day of service), after the service of this summons upon you, if served within this county, or if served out of this county but in this district within twenty days, otherwise within forty days, why you should not be bound by a certain judgment duly given and made by the said superior court of the state of California, in and for the said county of, on the day of, 18.., in favor of A. B., and against you and one E. F., for the sum ofdollars damages, and dollars costs of suit, in the same manner as if you had been originally summoned therein, and upon which said judgment it is alleged there remains due and unpaid the sum of dollars, and interest on said sum from the day of, 18.., at the rate of per centum per annum, as more fully appears by the affidavit of the said plaintiff, A. B., hereto attached, and to which reference is here made.

And you are hereby notified that if you fail to appear and show cause as above required within the time above stated, the said plaintiff will apply to the said court for an order and judgment that you be bound thereby in all respects as though you had been originally summoned in said action, to the extent of the said sum of dollars, and interest as aforesaid, and the cost of this proceeding, and that execution issue against you accordingly.

[Attestation, date, and signature.]

§ 5233. **Answer.**—The party summoned may answer the complaint as he might have done had he been originally served, or he may deny the judgment, or may set up any defense that may have arisen subsequently to the judgment. The action is really an action on the original joint contract, and matters of defense with respect to the judgment are merely incidental to the action.¹ The party summoned may deny the judgment, or set up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.²

§ 5234. **Issues and Verdict.**—The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability upon the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.³

§ 5235. **Pleadings.**—If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written obligations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute such written allegations.⁴

§ 5236. **Release.**—Prior to the code, the release of one joint debtor was a release as to all, but it was required to be a technical release under seal.⁵ It is now provided, however, that “a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him.”⁶ One of two joint debtors, who has been released under the insolvent act, is liable to contribution to his co-debtor for money paid to satisfy the joint obligation after the discharge.⁷

¹ Tay v. Hawley, 39 Cal. 98.

² Cal. Code C. P., sec. 992; Berlin v. Hall, 48 Barb. 442.

³ Cal. Code C. P., sec. 994.

⁴ Cal. Code C. P., sec. 993.

⁵ See Armstrong v. Hayward, 6 Cal. 185; Rowley v. Stoddard, 7 Johns. 210; Cheatham v. Ward, 1 Bos. & Pul. 633; Nicholson v. Revill, 1 Ad. & El.

683; American Bank v. Doolittle, 14 Pick. 126; Tuckerman v. Newhall, 17 Mass. 583; Goodman v. Smith, 18 Pick. 415; cited in Prince v. Lynch, 38 Cal. 528.

⁶ Cal. Civil Code, sec. 1543.

⁷ Ford v. Andrews, 9 Wend. 312; Frost v. Carter, 1 Johns. Cas. 74; Elsworth v. Caldwell, 18 Abb. Pr. 20.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

§ 5237. **In General.**—There are three classes of cases provided for in which proceedings supplementary to the execution may be had: 1. Where an execution against property of a judgment debtor is returned unsatisfied in whole or in part, the judgment creditor at any time after the return is entitled to an order requiring the judgment debtor to appear before such judge or a referee to answer concerning his property, but can not be required to attend out of the county where he resides.¹ This proceeding is based on the return of the execution, and no proof of property seems necessary. After the issuing of an execution against property, and upon proof by affidavit of the party or otherwise, to the satisfaction of the court or judge, or county judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, the judgment debtor may in like manner be required to appear and answer.² This proceeding is based on the proof of the existence of property, and no return of execution is necessary, but only that one shall have been issued against property; and it would seem that this proceeding was intended to be in aid of an existing execution.³ After the issuing or return of an execution against property, upon proof by affidavit or otherwise to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear before him or a referee appointed by him and answer concerning the same.⁴ In New York the amount of indebtedness shown need not exceed ten dollars.⁵ After the issuing and before the return of an execution against property, any person indebted to the judgment debtor may pay the sheriff the amount of his debt or enough to satisfy the execution.⁶

Proceedings supplementary to execution, as provided in the California practice act, are proceedings which are a substitute for a creditor's action in the old practice;⁷ and are regulated

¹ Cal. Code C. P., sec. 714.

² Id., sec. 715.

³ In New York both the cases are provided for by New York code, sec. 292.

⁴ Cal. Code C. P., sec. 717.

N. Y. Code, sec. 294.

⁶ Cal. Code C. P., sec. 716.

⁷ Adams v. Hackett, 7 Cal. 187; McCullough v. Clark, 41 Id. 298.

by statute, and are equally applicable to justices' courts.¹ It is not necessary to join in the proceedings the defendant not served in the action.² They can not, however, be had against corporations as judgment debtors in the action;³ at least they are not applicable to insolvent corporations.⁴ But where the proceedings are against third parties who are indebted to the judgment debtor, a corporation, or any officer or member thereof, may be required to appear and answer concerning such indebtedness.⁵ A foreign consul can not be required to submit to an examination.⁶ Before supplementary proceedings can be instituted on the return of an execution, the creditor's remedy by execution must be really exhausted.⁷ A levy of a second execution, if not sure to satisfy the debt, is no objection to supplementary proceedings under the first execution.⁸

§ 5238. Affidavit and Order for Examination of Judgment Debtor, or of Bailee or Debtor of Judgment Debtor.

Form No. 1173.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action.

II. On or about the day of, 18.., I recovered a judgment in said action in the superior court of the state of, in and for the county of, against C. D., the defendant in said action, for dollars, or thereabouts, for damages and costs, which judgment was duly entered and docketed in the office of the clerk of said court, in the said county of; that an execution against the property of the said defendant was duly issued thereon, and delivered to the sheriff of said county of

III. That, as I am informed and verily believe, the said C. D. has property which he unjustly refuses to apply toward the satisfaction of said judgment, to wit [designate property].

IV. That, as I am informed and verily believe, E. F. has

¹ Cal. Code C. P., sec. 905. As to how far these proceedings are deemed a new action, compare *Davis v. Turner*, 4 How. Pr. 190; *Orr's Case*, 2 Abb. Pr. 457; *Dresser v. Van Pelt*, 15 How. Pr. 19.

² *Emery v. Emery*, 9 How. Pr. 130.

³ *Hinds v. Canandaigua and Niagara Falls R. R. Co.*, 10 How. Pr. 487; *Sherwood v. Buffalo and New York City R. R. Co.*, 12 Id. 136.

⁴ *Hammond v. Hudson River Iron and Machine Co.*, 11 How. Pr. 29.

⁵ Cal. Code C. P., sec. 717; N. Y. Code, sec. 294.

⁶ *Griffin v. Dominguez*, 2 Duer, 656.

⁷ *Rodney v. Griffiths*, 6 Abb. Pr. 211; *Spencer v. Cuyler*, 17 How. Pr. 157; *Nagle v. James*, 7 Abb. Pr. 234.

⁸ *Sale v. Lawson*, 4 Sandf. 718; *Fellerman's Case*, 2 Abb. Pr. 155; *Lilliendal v. Fellerman*, 11 How. Pr. 528.

property belonging to said judgment debtor [or is indebted to the said judgment debtor], in an amount exceeding fifty dollars, to wit, in the sum of dollars.

[JURAT.]

[SIGNATURE.]

§ 5239. **Affidavit.**—The affidavit must show, as a jurisdictional fact, that the execution was against the property.¹ It need not state that the defendant has property. If the affidavit shows that the creditor is assignee of the judgment, it sufficiently shows his right to proceed;² or it may be in the name of the nominal plaintiff, for it is not a new suit.³ On application for an order to examine a third party, an affidavit, following the alternative words of the statute, “has property, etc., or is indebted,” is not sufficient.⁴

§ 5240. **Order for Appearance of Debtor.**

Form No. 1174.

[TITLE.]

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that an execution was duly issued against the property of C. D., the defendant in the above-entitled action, upon the judgment recovered therein, and that said C. D. has property which he unjustly refuses to apply towards the satisfaction of the judgment in said action, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, judge of the said superior court of the county of, state of, do hereby order and require the said defendant, C. D., personally to be and appear before G. H., the referee by me hereby appointed for that purpose, at his office in, in the county of, on the day of, 18.., at o'clock in the noon of that day, to answer concerning his property; and that a copy of said affidavit and of this order be previously served upon said defendant, C. D.

[DATE.]

[SIGNATURE.]

§ 5241. **Order.**—It is sufficient to confer jurisdiction on a return of execution unsatisfied, if it appear in respect to defendant's residence that the execution was issued to the sheriff of the county where he then resided and had a place of business, and the order must be made returnable “within the county to which the execution was issued.”⁵ The issuing and service of

¹ *People v. Hurlburt*, 5 How. Pr. 446; *Jesup v. Jones*, 32 How. Pr. 191; but see Cal. Code C. P., sec. 714. As

² *Hough v. Kohlin*, 1 Code R., N. S., 232; *Orr's Case*, 2 Abb. Pr. 457; *Ross v. Clussman*, 3 Sandf. 676. to the practice in New York, in procuring an order for the examination of third persons, see *Ward v. Beede*, 17 Abb. Pr. 1; S. C., 15 Id. 373; *Gibson v. Haggerty*, 37 N. Y. 555; *Lynch v. Johnson*, 46 Barb. 56.

³ *Id.*

⁴ *Lee v. Heirberger*, 1 Code R. 38.

⁵ *Bingham v. Disbrow*, 14 Abb. Pr.

an order creates no lien as against other creditors who in the mean time discover other property subject to execution and levy upon the same.¹ Where a judgment debtor is examined on supplementary proceedings, the order made is binding and estops the parties from again litigating the same matter in another action. If property be ordered to be delivered to the sheriff for sale under the execution, no action can be maintained against the sheriff for so selling it.²

§ 5242. **Order Forbidding Debtor to Transfer.**—The judge who makes an appointment of a receiver may make an order forbidding the debtor to transfer any debts or make other disposition of them until an opportunity be given the receiver to sue;³ and on violation of the order he is liable to punishment, as for a contempt.⁴

§ 5243. **Order for Payment.**—An order requiring the application of property to the payment of a judgment may be in the alternative that the defendant pay over, or that an attachment issue.⁵ Under the California practice, an appeal may be taken from an order made by a court or referee on proceedings supplementary to execution;⁶ so also in Nevada;⁷ but it seems that in New York such orders are discretionary, and an order denying an application for them is not appealable.⁸

§ 5244. **Order for Appearance of Bailee or Debtor of Judgment Debtor.**

Form No. 1175.

[TITLE.]

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that A. B. has property of the judgment debtor therein mentioned, and is indebted to him in an amount exceeding fifty dollars, to wit, in the sum of dollars, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, judge of the said superior court of the county of, state of, do hereby order and require the said A. B. personally to be and appear before E. F., the referee by me hereby appointed for that purpose, at his office in, in the county of, on the day of, 18.., at

¹ Becker v. Torrance, 31 N. Y. 631; consult Voorhees v. Seymour, 26 Barb. 569.

² McCullough v. Clark, 41 Cal. 298.

³ Ball v. Goodenough, 37 How. Pr. 479.

⁴ People ex rel. Noel v. Kingsland,

⁵ Keyes, 325; S. C., 5 Abb. Pr., N. S., 90.

⁶ Crouse v. Wheeler, 33 How. Pr. 337.

⁷ McCullough v. Clark, 41 Cal. 298.

⁸ Hagerman v. Tong Lee, 12 Nev. 331.

⁹ Joyce v. Holbrook, 7 Abb. Pr. 338.

o'clock in thenoon of that day, to answer concerning any property of the said judgment debtor in his possession, and concerning any debts due by him to the said judgment debtor; and that a copy of said affidavit and of this order be previously served upon said defendant, and upon said A. B.

[DATE.]

[SIGNATURE.]

§ 5245. **Contempt.**—If any person, party, or witness disobey an order of the referee, properly made, in proceedings before him under this chapter, he may be punished by the court or judge for a contempt;¹ and it is contempt to refuse on the ground that he is a witness attending on another court.² The court will not punish a debtor for contempt in disregarding the order requiring an examination before a referee in supplementary proceedings, where the same plaintiff had obtained a previous order against him on the same judgment, which was outstanding and not disposed of.³ If the judge finds the defendant able to pay the judgment, and orders him to do so within a time specified, and also to pay the costs stated, the defendant, if he fails to comply, may be proceeded against as for a contempt.⁴ For any disobedience to the order of the judge out of court, the court may punish by order to show cause or attachment.⁵

§ 5246. **Examination of Third Persons.**—Sections 241, 242, and 243 of the California practice act,⁶ relating to proceedings supplementary to execution, do not authorize the court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession, as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing, in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action.⁷ Where it is evident that a garnishee, on examination under an order sup-

¹ Cal. Code C. P., sec. 721.

² Page v. Randall, 6 Cal. 32.

³ Brockway v. Brien, 37 How. Pr. 270. As to the proper method of obtaining the attendance of a witness upon a hearing in supplementary proceedings, consult People etc. v. Dutcher, 3 Abb. Pr., N. S., 152.

⁴ Brush v. Lee, 6 Abb. Pr., N. S., 50.

⁵ Wickes v. Dresser, 4 Abb. Pr. 93; compare Wicker v. Dresser, 14 How. Pr. 465; see "Contempts," *post*, c. 5.

⁶ Cal. Code C. P., secs. 717-719.

⁷ Hathaway v. Brady, 26 Cal. 586.

plementary to execution, acts in bad faith in denying his indebtedness or asserting his claim, the referee may treat it as fraudulent and disregard it.¹

§ 5247. **Liability of Third Parties.**—Where the defendant in an action, whose property has been attached by the sheriff, deposited with the sheriff a sum of money in gold coin in lieu of an undertaking to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney, it was held that after plaintiff recovered judgment, the persons who borrowed the money did not hold in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution.² In order to bring a party within the terms of the two hundred and fortieth section of the practice act,³ there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs.⁴ If there is any dispute as to the ownership of the property, or if the third person proceeded against in good faith denies the debt, neither the judge nor referee has power or authority to decide the disputed question and order the property delivered, or money paid in satisfaction of the judgment; the only course to pursue is to apply for an order forbidding any transfer or other disposition, and authorizing a suit.⁵

§ 5248. **Satisfaction of Demand.**—The plaintiff, in an action for a personal tort, after a verdict in his favor, and before judgment, assigned the cause of action and verdict. Judgment having been subsequently entered, defendant was garnished under the execution issued on other judgments against the plaintiff, and paid to the sheriff the amount of the judgment in favor of the plaintiff against him, who applied the same upon the executions: it was held that the assignment was void, and that the payment by defendant to the sheriff was a satisfaction of the judgment.⁶

§ 5249. **Receiver may be Appointed.**—In proceedings supplementary to execution the court has power, when it has

¹ Parker v. Page, 38 Cal. 522; but see Hagerman v. Tong Lee, 12 Nev. 331.

² Hathaway v. Brady, 26 Cal. 586.

³ Cal. Code C. P., sec. 716.

⁴ Brown v. Ayres, 33 Cal. 525.

⁵ Under section 246, Nev. Stat. (Cal. Code C. P., sec. 720); Hagerman v. Tong Lee, 12 Nev. 331.

⁶ Lawrence v. Martin, 22 Cal. 173.

all parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment debtor, or to such third person as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt.¹

§ 5250. **Witnesses.**—Witnesses may be required to appear and testify before the judge or referee upon any proceeding under this chapter in the same manner as upon the trial of an issue.²

§ 5251. **What Property may be Reached.**—Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession or in the possession of another party which is conceded to belong to the defendant. The judge has no power to try the question of title, where the property is in the hands of others who make claim to it.³ Property held in trust for the support of the judgment debtor can not be reached;⁴ but property previously deposited in bank, under an account opened in his name “in trust,” can be so reached.⁵ The creditor can only reach moneys actually due, and not moneys to become due on a contingency or on an executory contract;⁶ nor property acquired after commencement of the proceedings and which had already been paid out to another creditor;⁷ nor the earnings accruing after the date of the order;⁸ nor movables which the debtor assigned for the benefit of his creditors while the execution was in life in the sheriff’s hands;⁹ nor a right of action for a mere tort;¹⁰ nor the interest of the debtor as a *cestui que trust*.¹¹ Where the wife declares a home-

¹ Hathaway v. Brady, 26 Cal. 586. As to proceedings therein, consult Bloodgood v. Clark, 4 Paige Ch. 574; Fitzburgh v. Haveringham, 6 Id. 29; Browning v. Bettis, 8 Id. 568; Kemp v. Harding, 4 How. Pr. 178; Dorr v. Noxon, 5 Id. 29; Myres’ Case, 2 Abb. Pr. 476; Todd v. Crooke, 4 Sandf. 694; People v. Hurlburt, 5 How. Pr. 446; Ball v. Goodenough, 37 Id. 479; Kennedy v. Thorp, 3 Abb. Pr., N. S., 131. The history of a receiver’s powers under several statutes considered: Hayner v. Fowler, 16 Barb. 300; see Porter v. Williams, 9 N. Y. 142; Edmonston v. McLoud, 16 Id. 543.

² Cal. Code C. P., sec. 718; N. Y. Code, sec. 295; McCullough v. Clark, 41 Cal. 298.

³ Hagerman v. Tong Lee, 12 Nev.

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331; Stewart v. Foster, 1 Hilt. 505; Hall v. McMahon, 10 Abb. Pr. 103; Teller v. Randall, 40 Barb. 242; Crounse v. Whipple, 34 How. Pr. 333.

⁴ Locke v. Mabbett, 2 Keyes, 457; Campbell v. Foster, 35 N. Y. 361.

⁵ People v. Kingsland, 3 Keyes, 325; S. C., 5 Abb. Pr., N. S., 90.

⁶ McCormick v. Kehoe, 7 N. Y. Leg. Obs. 184.

⁷ Caton v. Southwell, 13 Barb. 335.

⁸ Campbell v. Foster, 16 How. Pr. 275.

⁹ Weed v. Pierce, 9 Cow. 728; Watrous v. Lathrop, 4 Sandf. 700.

¹⁰ Ten Broeck v. Sloo, 2 Abb. Pr. 234.

¹¹ Scott v. Nevius, 6 Duer, 672; Stewart v. Foster, 1 Hilt. 505.

stead, and the husband effects an insurance on the dwelling, taking the policy in his name, and the dwelling is destroyed by fire, the sum due from the insurance company can not be garnished by a creditor of the husband.¹

§ 5252. **Arrest of Judgment Debtor.**—Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge he may be ordered to enter into an undertaking, with sufficient surety, that he will attend, from time to time, before the judge or referee, as may be directed, during the pendency of the proceedings, and will not in the mean time dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.² This is a portion of the section which seems to be in aid of an existing execution, and must be accompanied by proof of property. Nothing is here said of the necessity of showing fraud; but it would seem to be necessary under the California constitution.

§ 5253. **Affidavit for Order of Arrest.**

Form No. 1176.

[TITLE.]

[Same as in Form No. 1173, down to and including III.]

IV. And I further state that I have reason to believe, and do believe, that there is danger of the said C. D.'s absconding, and going beyond the reach of the process of this court, or without the limits of the state, with intent to defraud his creditors, and myself particularly; that my reasons for such belief are as follows [state facts].

[JURAT.]

[SIGNATURE.]³

¹ Houghton v. Lee, 50 Cal. 101.

² Cal. Code C. P., sec. 715.

³ As to forms of order and undertaking, the forms under "Arrest and

Bail" as a provisional remedy, *ante*, may be made to apply, with certain changes which will readily suggest themselves to the practitioner.

CHAPTER III.

ARBITRATIONS AND AWARDS.

§ 5254. Agreement of General Submission to Arbitration—Short Form.

Form No. 1177.

[TITLE.]

We, the undersigned, mutually agree to submit, and do hereby submit, all our matters in difference, of every name or nature, to the award and decision of P. R., R. S., and T. U., for them to hear and determine the same, and make their award in writing, on or before the day of next.

Witness our hands, this day of, 18..

[SIGNATURES AND SEALS.]

§ 5255. Agreement of Special Submission to Arbitration.

Form No. 1178.

[TITLE.]

Whereas a controversy is now existing and pending between A. B., of, etc., and C. D., of, etc., in relation to certain mining claims and quartz-mills, under a contract made by and between the said parties, at the town of aforesaid, on the day of last past:

Now, therefore, we, the undersigned, A. B. and C. D., aforesaid, do hereby submit the said controversy to the arbitrament of P. Q., R. S., and T. U., of, etc., or any two of them; and we do mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall in all things, by us and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing, under the hands of the said P. Q., R. S., and T. U., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on the day of next.

And it is hereby further stipulated and agreed by and between the said A. B. and C. D., the parties to said controversy, that this submission to arbitration of the controversy herein named shall be entered as an order of the superior court of the state of California, in and for the county of

Witness our hands, etc.

[SIGNATURES AND SEALS.]¹

¹ As to making submission an order of court, see Cal. Code C. P., sec. 1283.

§ 5256. Agreement to Determine Partnership Disputes by Arbitration.

Form No. 1179.

This agreement, made and entered into this day of 18.., between A. L. of the first part, F. H. of the second part, and G. F. of the third part, all of the city of the, county of

Whereas the said parties of the first and second parts were, for a long time prior to the day of, 18.., engaged and concerned together as copartners, which partnership was dissolved.

And whereas, for the purpose of compromising, finally ending, and absolutely determining all differences, controversies, actions, suits, debts, accounts, and demands whatsoever, had, made, moved, depending, arising, or accruing, or which at any time or times may be had by or between said parties of the first and second parts, for or by reason or means of the accounts of said copartnership, or of any matter or thing relating thereto, resulting therefrom, or otherwise howsoever, it has been covenanted by said parties to refer all such differences of accounts to the said party of the third part for arbitration and adjustment, and the said party of the third part has consented to become such arbitrator.

Now, this agreement witnesses, that the said parties of the first and second parts do hereby mutually covenant and agree, to and with each other, that the said party of the third part shall arbitrate, award, order, judge, and determine of and concerning all and all manner of actions, cause and causes of actions, suits, controversies, claims, and demands whatsoever relating to or growing out of their copartnership account, prior to the day of, 18.., and shall conclude such arbitration, and make, award, and deliver the same to either of said parties of the first or second part in three months from this day; and said parties of the first and second parts mutually agree to abide by the said award in all things.

§ 5257. Release to be Executed by Party to an Arbitration, when Required in the Award.

Form No. 1180.

Know all men by these presents: That I, A. B., of the county of, for and in consideration of the sum of one dollar, to me in hand paid by C. D., of, and in pursuance of an award made by P. Q., R. S., and T. U., arbitrators between us, the said A. B. and C. D., and bearing

date the day of, 18.., do hereby release and forever discharge the said C. D., his heirs, executors, and administrators, of and from all actions, cause and causes of action, suits, controversies, claims, and demands whatsoever, for or by reason of any matter, cause, or thing, from the beginning of the world down to the day of, 18.. [insert the date of submission].

In witness whereof, etc.

[SIGNATURES AND SEALS.]

§ 5258. Report of Arbitrators.

Form No. 1181.

[TITLE.]

We, the undersigned arbitrators appointed by the agreement of arbitration hereto annexed, respectfully report that the matters in said agreement of arbitration mentioned were duly brought to a hearing before us, on the day of, 18.., at the office of, in the county of: the said A. B. attending with his counsel, C. D., esq., and E. F. attending with his counsel, G. H., esq.; and evidence by and on behalf of each of the respective parties having been submitted and received, we find therefrom and make the following award [set forth award].

P. R. }
R. S. } Arbitrators.
X. Y. }

[DATE.]

§ 5259. Report of Arbitrators or Referee on a Part of Issues, or on an Account.

Form No. 1182.

[TITLE.]

To the court of

A reference having been made to me, by order dated the day of, 18.., to in this action, I respectfully report:

That I have heard both parties, and find the annexed account to be correct.

[ACCOUNT.]

[Or find the following facts: state them.]

C. D., Referee.

§ 5260. **Award Conclusive.**—An award rendered upon a fair arbitration of a matter in dispute between two parties, and for a long time after concurred in, must be held to be conclusive.¹ The award of money is absolute and unconditional, but the award of releases is different, for they are concurrent acts,

¹ *Jarvis v. Fountain Water Co.*, 5 Cal. 179.

and neither party can compel the other to execute a release, without the tender of a release by himself.¹ Where parties submit to an arbitrator, they are presumed to know that his award will be final, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award.² An award is void which is not final and conclusive, and does not embrace all the matter submitted.³

§ 5261. **Duty of Arbitrators.**—It is the duty of arbitrators to pass upon the whole subject in controversy, and if it appears on the face of the award that they have not disposed of the whole matter, or if the terms of the award render a further inquiry necessary to ascertain a sum to be paid or an act to be done, it is void.⁴

§ 5262. **Hearing.**—Each party to an arbitration is entitled to an opportunity to be heard in the presence of the other, and to have reasonable time to produce witnesses and examine them.⁵

§ 5263. **Invalid Awards.**—An award, to be valid, must be certain and decisive as to the matters submitted, and thus avoid all further litigation.⁶ A useless and invalid determination upon one item properly presented within the general terms of the submission must, on principle, be as fatal to the entire action of the arbitrators as an omission, intentional or unintentional, to notice the item at all.⁷ But the making of a new and supplementary paper, and attaching the same to the award after it has been delivered, does not vitiate the original award, and may be treated as surplusage.⁸ An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision.⁹ An award bad in part may be enforced for the part that is good, if not attached for fraud, and the matter is divisible.¹⁰

§ 5264. **Jurisdiction.**—Where it is stipulated that the submission be made an order of court, it must be of some court having jurisdiction of the subject-matter of the controversy, otherwise it is void *in toto*, and the arbitrators have no power under it.¹¹ If it appear that the intention was to make the award only a rule of court, the court has no jurisdiction.¹² It

¹ Dudley v. Thomas, 23 Cal. 365.

² Montifiori v. Engels, 3 Cal. 431.

³ Talbott v. Hartley, 1 Cranch C. 31; Colcord v. Fletcher, 50 Me. 398; McCrary v. Harrison, 36 Ala. 577.

⁴ Porter v. Scott, 7 Cal. 312.

⁵ Morewood v. Jewett, 2 Robt. 496.

⁶ Jacob v. Ketcham, 37 Cal. 197.

⁷ Muldrow v. Norris, 12 Cal. 331.

⁸ Dudley v. Thomas, 23 Cal. 365.

⁹ Walker v. Walker, 1 Wins. (N. C.) 259.

¹⁰ Muldrow v. Norris, 2 Cal. 74; Parmelee v. Allen, 32 Conn. 115. Instance of an award not void for uncertainty: Carsley v. Lindsay, 14 Cal. 390.

¹¹ Williams v. Walton, 9 Cal. 142.

¹² Fairchild v. Doten, 42 Cal. 125.

does not follow that because a matter in difference between parties may be submitted by them to arbitration, that a court of record, or any other court, will thereby acquire jurisdiction of the subject-matter in controversy or of the parties litigant, unless the agreement further stipulate that the submission and stipulation are filed with the clerk, and the clerk enter in his register of actions a note of the submission, with the names of the parties, the name of the arbitrator, etc., as required by the practice act.¹ In order to give the court jurisdiction, there must be a stipulation that the submission be entered as an order of court, and the clerk must make the proper entries in the register.²

§ 5265. **Judgment on Award.**—Where a submission to arbitration is made an order of court under the practice act, the clerk may enter judgment on the award, in due time, without any further order of the court.³ The report of a referee, and the award of an arbitrator, are in all essentials the same.⁴ And a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made may enter judgment upon it in court as a matter of course.⁵ After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.⁶ If a judgment on an award is entered by the clerk at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party can not afterwards question its validity on the ground that it was irregularly entered.⁷

§ 5266. **Matters Submitted.**—The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general of all matters in controversy, without

¹ Cal. Code C. P., sec. 1283; Ryan v. Dougherty, 30 Cal. 218.

² Pieratt v. Kennedy, 43 Cal. 393.

³ Carsley v. Lindsay, 14 Cal. 390; overruling Heslep v. City of San Francisco, 4 Id. 1.

⁴ Grayson v. Guild, 4 Cal. 122. As

to power of the court to modify or correct the award on motion, see Cal. Code C. P., sec. 1288.

⁵ Gunter v. Sanchez, 1 Cal. 45.

⁶ Cal. Code C. P., sec. 1286.

⁷ Hoogs v. Merse, 31 Cal. 128.

specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission.¹

§ 5267. **Must be in Writing.**—The submission must be in writing, and may be to one or more persons.² The award also must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. And when the submission is made an order of court, the award must be filed with the clerk.³

§ 5268. **Objections to Award.**—Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained.⁴ If the party in whose favor an award of arbitrators is made voluntarily takes judgment on the award, and then receives the amount of the judgment in satisfaction of it, this is a waiver of any errors or misconduct on the part of the arbitrators.⁵ If the parties upon the trial before the arbitrators submit by mutual consent matters not included in the written submission, and the arbitrators try such matters, neither party, after publication of the award, can object that the award exceeded the submission.⁶

§ 5269. **Organization.**—All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.⁷

§ 5270. **Power of Arbitrators.**—Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon;⁸ and to award costs.⁹ The arbitrator must make his award within the time limited in the agreement, or both the arbitrator and court lose jurisdiction of the case, unless the parties stipulate in writ-

¹ Muldrow v. Norris, 12 Cal. 331.

² Cal. Code C. P., sec. 1282.

³ Cal. Code C. P., sec. 1286.

⁴ See Blair v. Wallace, 21 Cal. 317.

⁵ Hoogs v. Morse, 31 Cal. 128.

⁶ Woods v. Page, 37 Vt. 252.

⁷ Cal. Code C. P., sec. 1285.

⁸ Cal. Code C. P., sec. 1284.

⁹ Dudley v. Thomas, 23 Cal. 365;
Jones v. Carter, 8 Allen, 431.

ing to extend the time.¹ Arbitrators have power to determine both the validity and amount of the claim in dispute.² And after an award has been once made and delivered, the arbitrators can not alter the same, even to correct mistakes, without the consent of the parties.³ They have no common-law powers when appointed under the statute.⁴

§ 5271. **Principles of Determination.**—Arbitrators, under a general submission, are not bound to decide according to strict law; but where they intend to decide according to a law, a mistake apparent on the face of the award is fatal.⁵ If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law.⁶

§ 5272. **Setting Aside Award.**—Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake, or accident. An award may be set aside for a mistake of law, when it appears on the face of the award.⁷ Where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside.⁸ If the arbitrator rules upon question of law, and refers the whole matter to the court for revision, and it is found that he mistook the law, his report will be set aside.⁹ That the arbitrator did not act upon all the items or property of a partnership is no ground for vacating his award. Certainly not if the facts were not brought before him.¹⁰

§ 5273. **Revocation.**—An agreement to submit matter to arbitration is, both at law and in equity, revocable before the award is given;¹¹ and it can not be made irrevocable by agreement of parties;¹² otherwise, it seems, of a submission by rule of court.¹³ When entered as an order of court, the submission can not be revoked without the consent of both parties;¹⁴ otherwise it may be revoked at any time before the award is made.¹⁵

§ 5274. **Submission in Particular Cases.**—One partner can not bind his copartner by a submission of partnership mat-

¹ Ryan v. Dougherty, 30 Cal. 410; Pulliam v. Pensoneau, 33 Ill. 218. 375.

² Colcord v. Fletcher, 50 Me. 398.

³ Russ. on Abr. 135; Porter v. Scott, 7 Cal. 312; Dudley v. Thomas, 23 Id. 365.

⁴ Williams v. Walton, 9 Cal. 145; Bayne v. Morris, 1 Wall. 97; Talbott v. Hartley, 1 Cranch C. C. 21.

⁵ Muldrow v. Norris, 2 Cal. 74.

⁶ Id.

⁷ Muldrow v. Norris, 2 Cal. 74.

⁸ Pierson v. Norman, 2 Cal. 599.

⁹ Cushman v. Wooster, 45 N. H.

¹⁰ Carsley v. Lindsay, 14 Cal. 390; see Valle v. Northern Missouri R. R. Co., 37 Mo. 445; see, as to grounds of setting aside an award, Cal. Code C. P., sec. 1287.

¹¹ 7 East, 607; 1 Bing. 89.

¹² Tobey v. The County of Bristol, 3 Story C. C. 800.

¹³ Masterson v. Kidwell, 2 Cranch C. C. 669.

¹⁴ Cal. Code C. P., sec. 1283.

¹⁵ Id.

ters to arbitration;¹ but such a submission would be good against the partner agreeing to it.² Whenever parties may by their own act transfer real property, or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement.³ When an agreement in writing is entered into under the section of the practice act,⁴ to submit questions of difference relative to the partition of lands to the award of arbitrators, and the arbitrators meet and make their award, a court of equity will decree a specific performance of the award;⁵ even though the party refusing to perform should agree to pay the penalty agreed on.⁶ If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to all the matters submitted, and operates to render the submission conditional and the award binding only in case the arbitrators pass upon every subject either specially referred to them or brought to their notice under the general terms of the submission.⁷ An action for the recovery of mining ground on public land is regarded as a "question of title to real property," and therefore can not properly be submitted to arbitration.⁸

§ 5275. **Umpire.**—When matters in dispute are submitted to arbitration, with power for the arbitrators to appoint an umpire, the arbitrators have a right to select the umpire, either before or after the investigation of the matter has commenced, even though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators.⁹ An umpire is not to be called in until the original arbitrators have differed, and then only to decide the points on which they differ.¹⁰ An umpire must hear the parties. His award made on the statement of the arbitrators is not binding.¹¹ And must give notice of the time and place of his proceeding.¹²

§ 5276. **Who may Submit to Arbitration.**—Persons capable of contracting may submit to arbitration any controversy

¹ *Karthauss v. Ferrer*, 1 Pet. 222.

² *Jones v. Bailey*, 5 Cal. 345.

³ *Blair v. Wallace*, 21 Cal. 317.

⁴ Cal. Code C. P., sec. 1281.

⁵ *Whitney v. Stone*, 23 Cal. 275.

⁶ *Id.*

⁷ *Muldrow v. Norris*, 12 Cal. 331.

⁸ *Spencer v. Winselman*, 42 Cal. 479; Cal. Code C. P., sec. 1281.

⁹ *Dudley v. Thomas*, 23 Cal. 365.

¹⁰ *Traverse v. Beall*, 2 Cranch C. C. 113.

¹¹ *Taber v. Jenny*, Sprague, 315.

¹² *Thornton v. Chapman*, 2 Cranch C. C. 244.

which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.¹ An attorney at law, as such, has authority to refer to arbitration a suit in which he is employed.²

CHAPTER IV

CONFESSION OF JUDGMENT.

§ 5277. **In General.**—A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.³ A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: 1. It must authorize the entry of judgment for a specified sum; 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due; 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.⁴ The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, thereupon becomes the judgment roll.⁵ Judgment by confession may also be entered in a justice's court for any amount within its jurisdiction.⁶ The confession must specify the justice's court in which it is to be entered.⁷ The statement and affidavit in all other respects is the same as in district courts. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.⁸

¹ Cal. Code C. P., sec. 1281; Higgins v. Kinneady, 20 Iowa, 474; Ryan v. Dougherty, 30 Cal. 218.

² Holker v. Parker, 7 Cranch, 436. Alexandria Canal Co. v. Swann, 5 How. U. S. 83; and see Green v. Darling, 5 Mason, 201. Case where an agent submitted to arbitration the question of damage done to land owned by the

wife of his principal: Smith v. Sweeney, 35 N. Y. 291.

³ Cal. Code C. P., sec. 1132.

⁴ Id., sec. 1133.

⁵ Id., sec. 1134.

⁶ Id., secs. 889, 1132, 1135.

⁷ Id., sec. 889.

⁸ Id., sec. 1135.

§ 5278. **Statement and Confession of Judgment.***Form No. 1183.*

[TITLE.]

I, C. D., defendant in the above-entitled action, do hereby confess judgment therein, in favor of A. B., the plaintiff in the said action, for the sum of dollars, and authorize judgment to be rendered therefor against me, with legal interest thereon from this date.

This confession of judgment is for a debt justly due and owing to the said plaintiff, arising upon the following facts, to wit [state facts specifically, with circumstances, date, place, etc.]

[SIGNATURE.]

State of }
County of } ss.

C. D., being duly sworn, deposes and says as follows:

I am the person who signed the above statement, and I am indebted to the said A. B. in the sum of dollars in said statement mentioned; and the facts stated in the above confession and statement are true.¹

[JURAT.]

[SIGNATURE.]

§ 5279. **Collateral Attack.**—Every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolved, in trust for the benefit of others than the debtor.² A confession of judgment made for such a purpose will be held void as to such creditor upon a direct proceeding taken by him to avoid it.³ It is not necessary that the plaintiff in such action should be either a judgment or execution creditor. A lien acquired by attachment suffices.⁴ Where a judgment was rendered by confession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they can not, at the instance of one not a party to the judgment, be invoked to set aside or show the judgment was a nullity.⁵ Where judgment is taken by con-

¹ As to the form of statement on confession of judgment, in the case of money lent, see *Union Bank v. Bush*, 36 N. Y. 631. For goods sold, see *Gandall v. Finn*, 1 Keyes, 217; S. C., 33 How. Pr. 444. If a statement is sufficiently explicit, within the language and meaning of the code, the omission of a schedule therein referred to as "annexed" will not invalidate the judgment: *Clements v. Gerow*, 1 Keyes, 297. The supreme court has

power to amend a statement and confession of judgment: *Mitchell v. Van Buren*, 27 N. Y. 300; *Union Bank v. Bush*, 36 N. Y. 631.

² Cal. Civil Code, sec. 3439.

³ *Ryan v. Daly*, 6 Cal. 239; *Lee v. Figg*, 37 Id. 328.

⁴ *Scales v. Scott*, 13 Cal. 76; *Heyne-man v. Dannenberg*, 6 Id. 376.

⁵ *Cloud v. El Dorado Co.*, 12 Cal. 133.

fession in good faith and for value, it can not be impeached for fraud between other parties.¹ To be vacated, the judgment must be wholly void. One insufficient item will not avoid it, if the rest be good.² Judgment can not be impeached by attaching creditor; only by holder of judgment.³

§ 5280. **Insufficient Statements.**—A statement for confession of judgment, to the effect that the indebtedness is upon a note, etc., is insufficient. So where the statement is that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this, that it does not show the kind or quantity or price of the goods, or time of sale, or when the money was received, or under what circumstances, or how much of the indebtedness is for money and how much for goods; and the judgment confessed is *prima facie* fraudulent.⁴ For, cash loaned, without giving particulars of loans, was held insufficient.⁵ So for balance of account, without stating any facts as to sales out of which it arose.⁶ It should appear by some form of direct statement that at the very instant the judgment was confessed the relation of debtor and creditor existed, and to the extent stated in the judgment.⁷ To rebut the presumption of fraud, the facts proved must be consistent with the averments of the statement, and in support of them.⁸

§ 5281. **Joint Debtor.**—A judgment by confession of one joint debtor will not reach the joint property, but be effective only against him who authorizes its entry, as such a judgment is unauthorized.⁹

§ 5282. **Judgment Creditor, Proceedings by.**—A judgment creditor, made such by confession of judgment, who seeks to reach money in the hands of the junior judgment creditors, upon the ground that he has a prior lien upon the same, must aver in his complaint that at the time his judgment was rendered the amount for which it was rendered was unpaid and due.¹⁰

§ 5283. **On Award.**—A judgment may be entered by confession for the amount specified in the award, in the same way that it may for the sum mentioned in a bond, note, or other instrument, but that is a judgment by confession.¹¹

§ 5284. **Promissory Note.**—Where judgment is confessed

¹ Kirby v. Fitzgerald, 31 N. Y. 417.

² Frost v. Koon, 30 N. Y. 428.

³ Bentley v. Goodwin, 15 Abb. Pr. 82.

⁴ Cordier v. Schloss, 18 Cal. 576; see also Wilcoxon v. Burton, 27 Id. 233.

⁵ McDowell v. Daniels, 38 Barb. 143.

⁶ Miller v. Earle, 24 N. Y. 110, 112.

⁷ Denver v. Burton, 28 Cal. 549.

⁸ Pond v. Davenport, 44 Cal. 487.

⁹ Flannery v. Anderson, 4 Nev. 437;

Nev. Pr. Act, sec. 32.

¹⁰ Denver v. Burton, 28 Cal. 549

¹¹ Gunter v. Sanchez, 1 Cal. 48.

on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors.¹ That notes specified were given for purchase of a described indebtedness, without specifying original consideration, was held sufficient.²

§ 5285. **Setting Aside Confessions.**—An application by a defendant, or by a judgment creditor, to set aside his confession of judgment, should show that the claim was not just, and that the judgment ought not to have been confessed.³ Whether he could thus impeach his former acts doubted.⁴ A junior judgment creditor has no right to join with the defendant in such application.⁵ In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices. A slight mistake in the computation of interest, the date being given, is no evidence of fraud.⁶ A judgment by confession upon a statement which does not sufficiently state the facts out of which the indebtedness arose, nor that the amount confessed was justly due, is not a nullity on its face, and can only be called in question by the creditors of the defendant on the ground of fraud in a direct proceeding for that purpose.⁷ A general allegation that the confession of judgment was to hinder, delay, and defraud is not sufficient: where fraud is alleged, the facts must be set forth.⁸ A debtor may prefer a particular creditor by giving a confession of judgment, unless prohibited by statute. It is not necessary to annex a statement on which a confession of judgment is rendered in a proceeding to set aside the confession upon the ground of insufficiency of such statement.⁹

§ 5286. **Several Judgments.**—Where the same fraudulent debtor confesses several fraudulent judgments in several courts, it would not be necessary for a creditor to bring a different suit in each different court.¹⁰ In such cases the question of fraud; if there be any proof, is for the jury; otherwise for the court.¹¹

§ 5287. **Sufficiency of Statement.**—The statute requires the debtor to state enough of facts to enable creditors to inquire

¹ McKenty v. Gladwin, 10 Cal. 227.
As to sufficiency of statement on a promissory note, see Acker v. Acker, 1 Keyes, 291.

² Kirby v. Fitzgerald, 31 N. Y. 417.

³ Arrington v. Sherry, 5 Cal. 513.

⁴ Id.

⁵ Arrington v. Sherry, 5 Cal. 513.

⁶ Scales v. Scott, 13 Cal. 76.

⁷ Lee v. Figg, 37 Cal. 328.

⁸ Meeker v. Harris, 19 Cal. 289.

⁹ Vannice v. Greene, 14 Iowa, 262.

¹⁰ Uhlfelder v. Levy, 9 Cal. 615.

¹¹ King v. Davis, 34 Cal. 100.

into the transaction.¹ General specification of loans, and purposes for which they were made, was held sufficient;² so a general statement that indebtedness was in respect of sale of interest in partnership property.³ So as to facts as to numerous sales, conducing to a balance, for which judgment confessed.⁴

§ 5288. **Void Judgments.**—A judgment confessed for the purpose of hindering, delaying, or defrauding creditors is void as to such creditors.⁵ The authority given by statute for entering judgment by confession must be strictly pursued.⁶

CHAPTER V

CONTEMPT OF COURT.

§ 5289. **In General.**—Contempt is a willful disregard or disobedience of a public authority. Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings.⁷ In California the statute enumerates certain acts and omissions which are declared to be contempts of the authority of the court.⁸ Any judicial officer may punish for contempt in the cases provided for in the code.⁹ If a court having jurisdiction should issue an erroneous order, a disobedience of it is a contempt.¹⁰ Any publication pending a suit, reflecting either upon the court, the jury, the parties, the counsel, etc., with reference to the suit, or tending to influence the decision of the cause, though not aspersive of the court, is a contempt.¹¹ To call another a liar in the pres-

¹ McDowell v. Daniels, 38 Barb. 143.

² Frost v. Koon, 30 N. Y. 428.

³ Thompson v. Van Vechten, 27 N. Y. 568. Confession sustained stating facts sufficient to sustain liability by necessary implication: Read v. French, 28 Id. 285. Confession specifying consideration of notes in general terms upheld: Ely v. Cooke, Id. 365; Kellogg v. Cowing, 33 Id. 408.

⁴ Neusbaum v. Keim, 24 Id. 325; see also Curtis v. Corbit, 25 How. Pr. 58. So as to general statement as to notes indorsed for accommodation of confessor: Hopkins v. Nelson, 24 N. Y. 518.

⁵ Ryan v. Daly, 6 Cal. 238; Scales v. Scott, 13 Id. 76.

⁶ Chapin v. Thompson, 20 Cal. 681; Richards v. McMillan, 6 Id. 419; Cordier v. Schloss, 18 Id. 576.

⁷ Bouv. L. Dict.

⁸ Code C. P., secs. 1209, 1210.

⁹ Id., sec. 178.

¹⁰ In re Cohen & Jones, 5 Cal. 494; see Batchelder v. Moore, 42 Id. 412.

¹¹ Hollingsworth v. Duane, Wall. C. C. 100; and see United States v. Duane, Id. 102. See, as to order to execute a release or conveyance, Morris v. Walsh, 9 Bosw. 636. The above is an early authority, and will hardly stand the test of the more recent and more liberal decisions.

ence of the court, and in the hearing of its officers, is a contempt. Violent language and an assault made, in a hall adjoining a court-room, and within the hearing of the court, it then being in session, is a contempt, which the court may punish, within the meaning of the act.¹ When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in presence of the court, the facts must be shown by affidavits, or by a statement by the referees or arbitrators, or other judicial officer.² When the contempt is not committed in the view and presence of the court a warrant of attachment may be issued, or without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer or such notice or order to show cause.³ Whenever a warrant of attachment is issued, the court or judge must direct, by an indorsement thereon, that the person named may be let to bail for his appearance, in a sum named in such indorsement.⁴ When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear the answer, and witnesses may be examined for and against him, and adjournments may be had from time to time if necessary. Whether the person is guilty of the contempt charged must be determined from the answer and evidence taken, and if adjudged guilty, he may be fined in a sum not exceeding five hundred dollars, or imprisoned not exceeding five days, or both.⁵ When the contempt consists in the omission of an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.⁶

¹ United States v. Emerson, 4 Cranch C. C. 188.

² Cal Code C. P., sec. 1211.

³ Id., sec. 1212.

⁴ Id., sec. 1213. As to service of the warrant, letting to bail, condition of the undertaking, etc., see Id., secs. 1214 to 1216.

⁵ Cal. Code C. P., secs. 1217, 1218.

⁶ Id., sec. 1219. For enumeration of contempts, consult Cal. Code C. P.,

secs. 1209, 1210, 1991, and 1000; Tomlin's Law Dict. That to obtain an opinion of the court affecting the rights of persons, not parties to the pretended controversy, would be punishable as a contempt, see Lord v. Veazie, 8 How. Pr. 251; Cleveland v. Chamberlain, 1 Black, 419. That the clerk may have an attachment for non-payment of his fees, see Lee v. Patterson, 2 Cranch C. C. 199.

§ 5290. **Commitment for Contempt for Disrespectful Language.**

Form No. 1184.

[TITLE.]

The people of the state of California, to the sheriff of
county, greeting:

Whereas, an action was duly commenced in the said court on the day of, 18.., between A. B. as plaintiff and C. D. as defendant, for the purpose of [state purpose of the action], and was regularly pending in said court on the day of, 18..; and whereas, on that day, during the hearing of said action, and in the presence and hearing of said court, while said court was in session, R. N., a witness summoned in said action [or the plaintiff, or defendant, or counsel, or a by-stander, or otherwise, as the case may be], did publish, utter, and say aloud and in the hearing of the court and others, that [here insert disrespectful or contemptuous language], of and concerning said court, with the view, on the part of the said R. N., to bring this court and its proceedings in said action into contempt, and that such misconduct did, in fact, impair, hinder, and prejudice the rights and remedies of A. B., the plaintiff [or of C. D., the defendant] in said action, and did, in fact, interrupt, impede, and hinder the course of justice in the hearing and deliberation of the court in said action, and that the said R. N. thereby had become liable to punishment for said disrespectful and contemptuous language, pursuant to the statute in such case made and provided; and whereas, the said court did, at the same time by its order, then duly entered, adjudge and declare that the said R. N. had been guilty of a contempt of said court by the use of said disrespectful and contemptuous language, and did order that the said R. N. be punished for his said contempt by imprisonment in the common jail of county for the term of days.

Now, therefore, you are required and commanded, and we do warrant and enjoin you, that you forthwith attach the said R. N. and commit him to the common jail of county, and detain him there for the term of days, as a punishment for his said contempt of the court, and for such arrest, imprisonment, and detention, this shall be your sufficient warrant.

Witness, the Hon. J. C., judge of the court, at the city hall, in the city and county of this day of, 18..

[SIGNATURE.]

By the special order of the court.

[SIGNATURE OF CLERK.]

§ 5291. **Affidavit.**—It is essential to the validity of proceedings in contempt, whereby a person is subjected to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere intendments and presumptions will not be indulged in their support; and if the affidavit be defective in stating the facts, it is equivalent to no affidavit.¹

§ 5292. **Commitment should State.**—A commitment for contempt for refusing to obey an order of court, commanding the imprisonment of the party in contempt until he shall comply with the order, should set forth that it is in the power of the party to comply.² Though courts are exclusive judges of their own contempts, still a party can not be imprisoned for neglecting or refusing to do what it appears it is out of his power to perform.³ The order of the court must show upon its face the facts upon which the exercise of the power to punish is based.⁴ It is a contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another court.⁵

§ 5293. **Disobedience of Process.**—Where the process of a court, as an execution commanding the sheriff to deliver possession of a chattel, has been finally and completely executed, the power of the sheriff under it, and the authority of the court to enforce it, cease; and a wrong-doer afterwards trespassing upon the person thus put in possession can not be deemed guilty of contempt for disobedience to the process of the court.⁶

§ 5294. **Evidence of Contempt.**—When the contempt is not committed in *facie curiæ*, it must be proved by affidavits from persons who witnessed it.⁷ A clear case must be shown.⁸ Where the facts which are supposed to establish misconduct in an attorney are susceptible of explanation showing them consistent with professional propriety, the district court has no power to adjudge the attorney guilty of contempt, and to strike him from the rolls, without affording him an opportunity for explanation.⁹ No intendments of material facts should be indulged in.¹⁰

¹ Batchelder v. Moore, 42 Cal. 412.

² Ex parte Cohen, 6 Cal. 318; McCartan v. Van Syckel, 10 Bosw. 694.

³ Adams v. Haskell, 6 Cal. 316.

⁴ People v. Turner, 1 Cal. 152.

⁵ Page v. Randall, 6 Cal. 32.

⁶ Loring v. Illsley, 1 Cal. 24.

⁷ 7 Dane Abr. 307.

⁸ In re Judson, 3 Blatchf. 148. As to court not hearing collateral evidence, see United States v. Dodge, 2 Gall. 313; and see Thornton v. Davis, 4 Cranch C. C. 500.

⁹ Fletcher v. Daingerfield, 20 Cal. 427.

¹⁰ Matter of Metcalf v. Messenger, 46 Barb. 325.

§ 5295. **Injunction, Violation of.**—When an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond, it was held that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there were error in the order modifying the injunction, is by appeal, but he can not have a *mandamus* to compel the issuance of attachment for contempt.¹ A violation of an injunction, induced by the stratagem of the plaintiff, is not ground for an attachment.² Where the court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused on the ground that the appeal superseded the injunction, it was held that a *mandamus* may issue to compel the district judge to issue the attachment, the plaintiff's remedy by appeal being inadequate.³ The superior court alone has jurisdiction to try and punish for a contempt for the violation of an injunction issued out of the said court.⁴

§ 5296. **Jurisdiction.**—Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency, and silence in its presence; and in such case may apprehend and punish an offender without further examination or proof; but where the offense is committed out of court, the party is entitled to a notice and a hearing in his defense.⁵ So of authority to punish a counsel for interrupting the proceedings at the trial.⁶ The superior courts have jurisdiction to punish for contempts of their process and to issue such writs as are necessary to the exercise of that jurisdiction.⁷ This power was designed not only to protect the court from contempt of its authority, but to give a party injured an additional remedy in the action for the restoration of what he was entitled to by the judgment.⁸ The jurisdiction to commit for contempt is derived from the

¹ Fremont v. Merced Min. Co., 9 Cal. 18.

² Sparkman v. Higgins, 2 Blatchf. 29.

³ Merced Min. Co. v. Fremont, 7 Cal. 130.

⁴ People v. County Judge of Placer County, 27 Cal. 151. See cases where defendant was held liable for contempt in cases of violation of injunction: Ewing v. Johnson, 34 How. Pr. 202; Battermann v. Finn, 32 Id. 501;

see also Neale v. Osborne, 15 Id. 81; People v. Sturtevant, 9 N. Y. 263; Wheeler v. Gilsey, 35 How. Pr. 139; Eureka Lake etc. Co. v. Superior Court, 5 West Coast Rep. 179; Hobbs v. Amador & S. C. Co., 4 Id. 523.

⁵ Ex parte Field, 1 Cal. 187.

⁶ Heerdt v. Westmore, 2 Robt. 697.

⁷ In re Cohen & Jones, 5 Cal. 494; Pitt v. Davison, 37 N. Y. 235.

⁸ People v. Dwinelle, 29 Cal. 632.

original order in which the proceedings are founded, not from the order to show cause why the party should not be punished.¹ Copies of the affidavits upon which the application is founded should be served with the attachment on the order.² A judge out of court can not punish as for contempt a disobedience of an order made by him in a statutory proceeding, unless authority so to punish is expressly conferred by law.³ A party can not be punished for a contempt in violating an order which the court had no jurisdiction to make.⁴

§ 5297. **Non-compliance with Mandamus.**—An attachment will not be issued against a district judge for non-compliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, when it does not appear from the papers on which the motion for the attachment is founded that any application has been made to the court to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the judge in vacation is concerned, he has in substance complied with the command of the writ of *mandamus*; and in such case it will not be deemed a disobedience of the writ that the court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ.⁵ So, for not having obeyed a peremptory writ of *mandamus*, where this has been adjudged superseded by a writ of error.⁶

§ 5298. **Order, how Reviewed.**—A commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by a superior court.⁷ Where an order was made by the district court of the eighth judicial district, whereby A. was ordered to be imprisoned forty-eight hours and fined five hundred dollars for contempt of court, without setting forth any of the facts whereon the order was based, it was held that a *certiorari* should issue to remove the proceedings for review into the supreme court; and further, that a *mandamus* was not a proper remedy in such case.⁸ It is the right and duty of the supreme court, on *habeas corpus*, to review the decisions of inferior courts, in cases of contempt, as well as in

¹ Myers v. James, 3 Abb. Pr. 301.

² Matter of Smethurst, 2 Sandf. 724.

³ People v. Brennan, 45 Barb. 344.

⁴ People v. O'Neil, 47 Cal. 109.

⁵ Ex parte Field, 1 Cal. 188.

⁶ United States v. Kendall, 5 Cranch C. C. 385.

⁷ Ex parte Rowe, 7 Cal. 181.

⁸ People v. Turner, 1 Cal. 152; see Ex parte Field, Id. 188. In Batchelder v. Moore, 42 Id. 413, the supreme court reviewed on *certiorari*, and set aside a judgment for contempt, on the ground that the court exceeded its jurisdiction. See also People v. O'Neil, 47 Id. 110.

others.¹ But an order of court adjudging a party guilty of contempt is not appealable.²

§ 5299. **Order Conclusive.**—The judgment and orders of the court or judge made in cases of contempt are final and conclusive.³ The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate court will compel the court below to issue an attachment to punish a contempt.⁴ Every court empowered to punish for contempt is not the sole and final judge in all cases of alleged contempt.⁵ An order of court adjudging a party guilty of contempt should always show upon its face the facts upon which the exercise of the power is based and the adjudication is made.⁶ Whenever an order of the district court fining and imprisoning for contempt does not specify on its face wherein the contempt existed, it will be reversed on *certiorari*.⁷

§ 5300. **Proceedings.**—The mode of proceeding to punish the editor of a newspaper for contempt in publishing an article reflecting upon a court of justice is, the prosecutor first proves by affidavit that the paper was published at the office of defendant, and that he is editor. Defendant is then called upon by rule to show cause why an attachment should not issue. On this rule he may controvert the fact, or defend on legal grounds. But if it appears that a contempt has been committed, an attachment will be directed, and where the defendant is brought in by it, he may demand that the prosecutor may file interrogatories, and if by his answers on oath he purges himself from criminality, he must be discharged. But interrogatories can not be forced upon him. If he will not ask them, and the contempt is proved by affidavit or other testimony of the prosecutor, the court will give judgment against him.⁸ Where the plaintiff proceeded, under section 239 of the practice act, to examine his judgment debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding.⁹

¹ Ex parte Rowe, 7 Cal. 181.

² Aram v. Shallenberger, 42 Cal. 275; Teller v. People, 3 West Coast Rep. 132; Tyler v. Connolly, 1 Id. 779.

³ Cal. Code C. P., sec. 1222; Ex parte McCarthy, 29 Cal. 399.

⁴ Merced Mining Co. v. Fremont, 7 Cal. 130.

⁵ Ex parte Rowe, 7 Cal. 175.

⁶ People v. Turner, 1 Cal. 152.

⁷ Ex parte Field, 1 Cal. 187.

⁸ Hollingsworth v. Duane, Wall. C. C. 77; see United States v. Duane, Id. 102.

⁹ Adams v. Hackett, 7 Cal. 187. As to the proceedings in cases of contempt, consult Cal. Code C. P., secs. 1209-1222.

§ 5301. **Re-entry on Lands.**—The superior courts have jurisdiction to punish for contempt persons who re-enter upon a tract of land after having been dispossessed therefrom by a judgment and process of a court of competent jurisdiction.¹ It is essential that the person accused be one who has been dispossessed or ejected.² A person against whom a judgment is recovered in ejectment, and who is removed from the land by a writ of restitution, is not guilty of a contempt for re-entering on the land, if an event has occurred after the judgment and before the re-entry which confers upon him the right of possession.³

§ 5302. **Refusal to Pay Money.**—Where, in the regular course of judicial proceedings before a court of general jurisdiction, a party having notice of the proceedings has been ordered by the judgment to pay a certain sum of money, and in default of obedience to the order has been committed for contempt, he can not, on application to the supreme court for a writ of *habeas corpus*, question the regularity of the acts; the power of the court below to make the order is the only question.⁴ In a suit for divorce, the court has power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt, in case of refusal to pay.⁵ Where a party to a divorce suit fails to pay money into the hands of the clerk, upon an order of court directing the payment, it seems an attachment may issue without summoning the party to show cause why it should not issue;⁶ so for the payment of alimony.⁷ A party can not be imprisoned for neglecting or refusing to do what clearly appears not to be in his power to perform; such as an order to pay into court certain moneys, when it is shown he did not have the moneys in question when the order was made.⁸

§ 5303. **Service of Order.**—In proceedings to punish the defendant for a contempt for refusing to comply with the judgment, personal service of the order to show cause why the defendant should not be punished is not indispensable;⁹ and interrogations are not necessary.¹⁰ But there must be service of the order, or notice, or attachment to answer.¹¹

¹ Cal. Code C. P., sec. 1210; *People v. Dwinelle*, 29 Cal. 632.

² *Batchelder v. Moore*, 42 Cal. 412.

³ *People v. Dwinelle*, 29 Cal. 632; *Mahoney v. Van Winkle*, 33 Id. 448.

⁴ *Ex parte Perkins*, 18 Cal. 60.

⁵ Id.

⁶ *Kernodle v. Cason*, 25 Ind. 362.

⁷ *Ward v. Ward*, 6 Abb. Pr., N. S., 79.

⁸ *Adams v. Haskell*, 6 Cal. 316.

⁹ *Pitt v. Davison*, 37 N. Y. 235.

¹⁰ Id. For proceedings in such cases, see Id.

¹¹ Cal. Code C. P., sec. 1212.

§ 5304. **Supplementary Proceedings.**—Interposing delays in supplementary proceedings, with the effect of defeating the creditor's attempt to reach the property, is a contempt of the order.¹ The refusal to apply property, though the defendant deny under oath that he had any, is a contempt.² The power to punish for contempt in supplementary proceedings is not affected by the fact that the judgment was merely for costs.³

§ 5305. **Undertaking for Appearance.**—Where a party has been arrested for a contempt, and has given bond, with sureties for his appearance at court, to abide the order of the court, and has been adjudged to be guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party.⁴

§ 5306. **Commitment for Refusal to Testify.**

Form No. 1185.

[VENUE.]

The people of the state of California, to A. P., sheriff of the said county, greeting:

E. F. having this day been brought before me, on a warrant by me issued to compel his attendance to testify [where the witness appears in pursuance of the subpoena, say, having this day appeared before me, in pursuance of a subpoena by me issued, requiring him to appear and testify] touching the execution of a conveyance of real estate from K. B. to C. T., to which the said E. F. is a subscribing witness, as is said; and the said E. F., although required by me, having refused to answer upon oath [if the commitment is made on account of the refusal of the witness to answer a particular question deemed pertinent by the officer, insert here, the following question, etc., specifying it particularly] touching the execution of said conveyance. You are therefore commanded forthwith to convey the said E. F. to the jail of the said county, and there commit him to close custody in such jail, without bail, until he shall submit to answer on oath as aforesaid [or the question aforesaid] or be discharged according to law.

O. P.,

[DATE.]

Judge of County.

§ 5307. **Disobedience of Witness.**—Disobedience to a subpoena, or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when required, may be pun-

¹ Ross v. Clusman, 3 Sandf. 667.

² Matter v. Pester, 2 Code Rep. 98.

³ Brush v. Lee, 6 Abb. Pr., N. S.,

50. See also, as to supplementary proceedings, Gerrigan v. Wheelwright, 3 Abb. Pr., N. S., 264.

⁴ Barton v. Butts, 32 How. Pr. 456.

ished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint may be dismissed or his answer stricken out.¹ So the refusal of one party to give to the other party, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession or under his control, containing evidence relating to the merits of the action or defense, may be punished as a contempt;² so of witness not producing books;³ so of refusal to submit to examination.⁴ Witness fined and required to give security, in refusing to answer questions before grand jury, and insolence to them.⁵

§ 5308. **Refusing to Testify.**—A statement that R. was committed for contempt in refusing to answer certain questions propounded to him by the grand jury is not a compliance with the section. The question asked should be set out.⁶ In such a case, the commitment should state that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions asked him, stating them; that he refused to answer; that the facts were thereupon presented to the court by the grand jury, and the prisoner, required by the court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate court to review on *habeas corpus*, the proceedings of an inferior in cases of contempt.⁷ A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on *habeas corpus*, where it appears that the suit has abated; there being no longer parties or subject-matter before the court, there is no longer a case in which the questions can be asked.⁸ It seems that the refractory witness might still be reached by attachment for the contempt, and by a judgment thereon.⁹ When witnesses are brought before either branch of the legislature, they may be compelled to testify by process of contempt, when without legal cause they refuse to do so.¹⁰

¹ Cal. Code C. P., sec. 1991; *Id.*, sec. 1209, subd. 10; *Clark v. Reese*, 35 Cal. 89; see also *Keisker v. Ayres*, 46 *Id.* 82.

² Cal. Code C. P., sec. 1000.

³ *Heerdt v. Wetmore*, 2 Robt. 697.

⁴ *Woods v. De Figaniere*, 1 Robt. 607.

⁵ *United States v. Caton*, 1 Cranch C. C. 150.

⁶ *Ex parte Rowe*, 7 Cal. 181.

⁷ *Id.*

⁸ *Ex parte Rowe*, 7 Cal. 175.

⁹ *Id.*

¹⁰ *Ex parte McCarthy*, 29 Cal. 395.

CHAPTER VI.

DEPOSIT IN COURT AND APPOINTMENT OF RECEIVER

§ 5309. **Deposit in General.**—Deposit in court may be made in the following cases, under the code: 1. In arrest and bail, the defendant at any time before execution shall be discharged from arrest upon depositing the amount mentioned in the order of arrest,¹ or he may at the time of the arrest deposit the amount in the hands of the sheriff; or, if the bail be reduced, may deposit the reduced amount instead of giving bail, and shall receive from the sheriff a certificate of the deposit made, and he shall be discharged from custody.² The sheriff shall then deposit the money in court, giving a certificate to each of the parties.³ Deposit in court may be made: 2. In actions for the foreclosure of mortgages, after the sale of the property, if there be surplus money after payment of the amount due on the mortgage, lien, or encumbrance, with costs, the court may cause the same to be paid to the persons entitled to it, and in the mean time may direct it to be deposited in court.⁴ Deposit in court may be made: 3. In actions against steamers, boats, and vessels, after the satisfaction of the execution by the application of the process of sale: 1. To the payment of the amount of claims filed; and 2. To the payment of the judgment and costs and sheriff's fees; if no appearance by the owner, master, or consignee has been made in the action, the court shall direct a deposit of the balance in court.⁵ Deposit in court may be made: 4. In appeal, to render the appeal effectual for any purpose, appellant shall file an undertaking in the amount required by law, or such amount may be deposited in court in lieu thereof.⁶ Deposit in court may be made: 5. A defendant, against whom an action is pending upon a contract or for specific personal property, at any time before answer, upon affidavit that a person, not a party to the action, makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon

¹ Cal. Code C. P., sec. 486.

² Id., sec. 497.

³ Id., sec. 498. As to disposition of money on recovery of judgment, see Id., sec. 500.

⁴ Cal. Code C. P., sec. 727.

⁵ Id., sec. 825.

⁶ Cal. Code C. P., sec. 941; and such deposit will be effectual as a stay of proceedings in the court below upon the judgment or order appealed from, except in the cases provided for in sections 942, 943, 944, and 945: Id., sec. 949.

notice to such person and the adverse party, may apply to the court to substitute such third person in his place and discharge him from liability to either party, on his depositing in court the amount claimed on such contract, or delivering the property or its value to such person as the court may direct; and the court may in its discretion make an order substituting a person in the place of the defendant, on the latter depositing in the court the amount claimed on the contract.¹ So a tenant may offer to pay the rents into court to abide the ultimate decision of the case.² There are many cases occurring in practice where the court, in the exercise of its equity powers, may order the fund which is the subject of the litigation to be paid into court to abide the result of the suit, as well as special sums for purposes incident to the action.

§ 5310. **Appointment of Receiver.**—A receiver may be appointed by the court in which an action is pending, or by the judge thereof, in the following cases: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiffs or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; 2. In an action by a mortgagee for a foreclosure of his mortgage and sale of the mortgaged property, where it appears there is danger of the mortgaged property being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt; 3. After judgment to carry the judgment into effect; 4. After judgment to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment; 5. In the case when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.³ Upon the dissolution of a corporation the district court

¹ Cal. Code C. P., sec. 386.

² Cal. Code C. P., sec. 564.

³ McDevitt v. Sullivan, 8 Cal. 592.

of the county may, upon the application of any creditor, stockholder, or member of the corporation, appoint one or more persons to be trustees or receivers, to take charge of the estate and effects thereof for the purposes named in the statute.¹

CHAPTER VII.

PROCEEDINGS ON OFFER TO COMPROMISE.

§ 5311. **In General.**—The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he can not recover costs, but must pay the defendants costs from the time of the offer.² An offer under the foregoing section is not to be deemed an admission that anything is due, unless the offer in the terms in which it is made is accepted, in which case judgment is entered.³ The distinction between an “offer to compromise” and a *cognovit* at common law should be kept in mind; the latter being good as an admission *in pais* after answer filed.⁴ If judgment is entered upon the *cognovit*, and by its authority, then the amount acknowledged would have been the sum of the judgment; but where upon complaint and answer denying the allegations thereof, the acknowledgment is used as evidence, interest may be given by way of damages.⁵ The “offer to compromise” and a *cognovit* depend for their effect upon actions

¹ See *Id.*, sec. 565. In the case of *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. The Fifteenth District Court, etc.*, 53 Cal. 495, decided December, 1878, by the supreme court of California, it was held that the general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against it by a private person, but such power, if it exists at all, must be derived from a statute conferring it upon the court, and that section 564

of the code of civil procedure does not confer it. It was further held that the effect of the appointment of a receiver in such case is to dissolve the corporation: See also *Ncall v. Hill*, 16 Cal. 145; and *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 388, cited in the above case. For notes and authorities upon the subject of receivers generally, see *ante*, secs. 581–604.

² Cal. Code C. P., sec. 997; see also *Id.*, sec. 895.

³ See *Id.*, sec. 2078.

⁴ *Hirschfield v. Franklin*, 6 Cal. 607.

⁵ *Id.*

already brought, and are therefore to be distinguished from a warrant of attorney to confess judgment, which is given before action brought, and the offer in writing under section 2074 of the California code of civil procedure, which may be made either before or after action brought. The true meaning of the statute authorizing the clerk to enter judgment upon an offer on the part of defendant to suffer judgment for a specified sum, etc., is that he can enter judgment only when the offer is made after action is brought by the filing of the complaint and while pending, and where the party hands to the clerk the complaint, offer of judgment, and notice of acceptance of the offer, at the same time, and thereupon the clerk enters judgment, it is void.¹ If the defendant at any time before the trial offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, be deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs.² An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the the actual production and tender of the money, instrument, or property.³

CHAPTER VIII.

INSPECTION OF BOOKS, DOCUMENTS, ETC., AND PROOF OF WRITINGS, RECORDS, AND STATUTES.

§ 5312. **In General.**—The code provides that any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a special time, an inspection and copy, or permission to take a copy of entries of accounts in any book or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book or the document or paper, from being given in evidence; or if wanted as evidence by the party applying, may di-

¹ *Crane v. Hirschfelder*, 17 Cal. 582.

² Cal. Code C. P., sec. 895.

³ *Id.*, sec. 2074.

rect the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.¹ The code does not prescribe upon what evidence the order shall be based, whether upon affidavit or oral testimony. The better practice is to base the motion upon affidavits showing that the books, papers, or documents are in the possession of the adverse party, or under his control, and their materiality as evidence, and to serve a copy of the same with the notice. When the order is obtained, a copy of it must also be served, not only for the purpose of laying a foundation for proceedings for contempt, but to notify him what particular books, papers, and documents are required to be inspected and copied. Where an inspection or copy is not desired in advance of the trial, notice may be given the adverse party to produce it; and if he fail to do so, the writing may then be proved by the party giving the notice, as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.²

§ 5313. Notice of Motion for Order of Inspection, etc., of Books, Documents, etc.

Form No. 1186.

[TITLE.]

To C. D., defendant in said action.

Sir: You are hereby notified that the plaintiff herein will, on the day of, 18.., at ten o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of said court, in the city hall at, in said county, move the court for an order that you give to this plaintiff an inspection and copy of [describe book, document, or paper], in your possession [or under your control], containing evidence relating to the merits of this action. Said motion will be based and heard upon the affidavit of, a copy of which is hereto attached and herewith served, and the files and records of said court in said cause.

E. F.,

Attorney for Plaintiff.

§ 5314. Notice to Produce Papers, etc., on Trial.

Form No. 1187.

[TITLE.]

To, defendant [or plaintiff].

You are hereby notified to produce upon the trial of the

¹ Cal. Code C. P., sec. 1000; see also *Id.*, sec. 1855, subd. 2. ² Cal. Code C. P., sec. 1938.

above-entitled cause [a certain contract in writing made between A. B. and C. D., on or about the day of, 18.., relating to the sale of the premises described in the complaint herein], and if you fail to do so secondary evidence of its contents will be given.

E. F.,

Attorney for Defendant.

§ 5315. **Affidavit to Prove Loss.**—In California the testimony may be given orally or offered by affidavit. Either course may be adopted, and either course will avail.¹ So proof of loss of an instrument may be by the party's own affidavit, to lay a foundation for proving the contents. But the affidavit of a third person, that a trunk of the party containing his papers is lost, is insufficient, without showing that it contained the paper in question. But this the party may show by his own oath.² An affidavit showing that the surveyor general has adopted a rule refusing to allow the original to be taken from the files is a sufficient predicate.³

§ 5316. **Altered Writing.**—The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. The party may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.⁴ Where a deed is produced, it is incumbent on the party to establish by satisfactory evidence that the alteration was made by the grantor or by his authority, or the deed will be deemed, for the purposes of the action, to read as it did before the alteration was made.⁵ A party offering a promissory note in evidence is not obliged, before the same is admitted, to account for an erasure appearing upon the face of it, unless the erasure has been made, or appears to have been made, after the execution of the instrument, and is on a part of the note which is material to the point in dispute.⁶ So, on a printed form of note, where the erasure is made only as to the printed matter.⁷

§ 5317. **Copies of Records as Evidence.**—Every citizen has a right to inspect and take a copy of any public writing of

¹ Bagley v. Eaton, 10 Cal. 126.

² McCann v. Beach, 2 Cal. 25.

³ Hensley v. Tarpey, 7 Cal. 288.

⁴ Cal. Code C. P., sec. 1982.

⁵ Galland v. Jackman, 26 Cal. 79.

⁶ Corcoran v. Doll, 32 Cal. 82.

⁷ Id.; see also Brooks v. Calderwood, 34 Cal. 564; Wunderlin v. Cadogan, 50 Id. 613.

this state, except as otherwise expressly provided by statute.¹ "Public writings" are laws, judicial records, other official documents, and public records, kept in this state, of private writings.² Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of legal fees therefor, and such copy is admissible in evidence in like cases and with like effect as the original writing.³ A public record of a private writing may be proved by the original record, or by a copy thereof certified by the legal keeper of the record.⁴ There is no attempt by the statute to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit.⁵ To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept.⁶ It is well settled that a certified copy of an instrument affecting real property, duly recorded, may be read in evidence, without proof of the original, if it be shown to the satisfaction of the court that the original is not under the control of the party.⁷ Alcaldes' records are on a footing with other records kept by the county recorder, and a certified copy of an instrument found therein is admissible under the same circumstances as are certified copies of records made by himself, upon proof of the loss of or inability of the party to produce the original.⁸ A sworn copy of exemplification of instruments in the archives of the government is evidence, and the originals ought not to be removed from the government offices.⁹

§ 5318. **Foreign State Records and Laws.**—A copy of the written law or other public writing of any state or county, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing.¹⁰ The oral testimony of witnesses skilled therein is admissible as evidence of the un-

¹ Cal. Code C. P., sec. 1892.

² Id., sec. 1894.

³ Id., sec. 1893.

⁴ Id., sec. 1919.

⁵ Macy v. Goodwin, 6 Cal. 579.

⁶ Kyburg v. Perkins, 6 Cal. 674.

⁷ Cal. Code C. P., sec. 1951; Hicks v. Coleman, 25 Cal. 122; Hurlbutt v. Butenop, 27 Id. 50; McMinn v. O'Connor, Id. 238; cited in Mayo v. Mazeaux, 38 Id. 442.

⁸ Kyburg v. Perkins, 6 Cal. 674; Donner v. Palmer, 31 Id. 500; Garwood v. Hastings, 38 Id. 216; citing Touchard v. Keyes, 21 Id. 210.

⁹ Gregory v. McPherson, 13 Cal. 574. Copy of decree of land commission as evidence, see Young v. Emerson, 18 Id. 416.

¹⁰ Cal. Code C. P., sec. 1901. As to statute-books of other states, published by authority, see Id., sec. 1900.

written law of a sister state or foreign country, as are also printed and published books of reports of the decisions of the courts of such state or country, or proved to be commonly admitted in such courts.¹

§ 5319. **Foreign Record.**—A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal, or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record, together with a certificate of the chief judge or presiding magistrate that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and the signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador of the United States, or of a consul, vice-consul, or consular agent of the United States, in such foreign country.² Such certificates are generally received as *prima facie* evidence of both the character of the officers giving them and the genuineness of their signatures.³ So of a certificate of a notary public or United States consul;⁴ or notaries and consuls of every grade, whether principal or inferior notary, or consul general, or vice-consul.⁵ A copy of the judicial record of a foreign country is also admissible in evidence upon proof: 1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it; 2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and 3. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.⁶

§ 5320. **Judicial Records.**—A judicial record of this state or of the United States may be proved by the production of the original or a copy thereof, certified by the clerk, or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate

¹ Cal. Code C. P., sec. 1902.

² Id., sec. 1906.

³ Mott v. Smith, 16 Cal. 533.

⁴ Id.

⁵ Mott v. Smith, 16 Cal. 533; see Ely v. Frisbie, 17 Cal. 250.

⁶ Cal. Code C. P., sec. 1907; see Young v. Rosenbaum, 39 Cal. 654.

of the chief judge or presiding magistrate that the attestation is in due form.¹

§ 5321. **Printed Statutes.**—Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code, or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof, are admissible in this state as evidence of such law.²

§ 5322. **Seal, Impression of.**—A seal of a court or public office may be impressed upon wax, wafer, or any other substance, and then attached to the original or a copy thereof, or it may be impressed on the paper alone.³ A scrawl, with “L. S.” written within, is sufficient as a private seal.⁴

§ 5323. **Secondary Evidence—Lost Papers.**—There shall be no evidence of the contents of a writing other than the writing itself, except: 1. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made.⁵ Diligent search in all places where the original is likely to be found must be shown, unless it is proved to have been destroyed.⁶ The facts and circumstances of the destruction must be shown.⁷ So in suit by the assignee of a book-account, the assignor is a competent witness to prove to the court the loss of the book of original entries, as a preliminary to the introduction of secondary evidence of its contents.⁸ So where the record-book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents.⁹ Proof that a notice upon a mining claim has been torn, and that the remaining portion is, as the witness thinks, illegible and defaced, is enough to introduce a copy of it.¹⁰ But a copy of a notice posted on a mining claim, to show its extent, is not admissible in evidence, if the notice itself be attainable.¹¹ The proof

¹ Cal. Code C. P., sec. 1905; see also Const. U. S., art. 4, sec. 1; *Thompson v. Manrow*, 1 Cal. 428; *Parke v. Williams*, 7 Id. 249; *Low v. Burrows*, 12 Id. 181.

² Cal. Code C. P., sec. 1900.

³ Cal. Code C. P., sec. 1931; *Connolly v. Goodwin*, 5 Cal. 220.

⁴ Cal. Code C. P., sec. 1931; see, as to certified copy of deed, *Jones v. Martin*, 16 Cal. 166; see also *Donner v. Palmer*, 31 Id. 500, and cases there cited.

⁵ Cal. Code C. P., sec. 1855, subd. 1.

⁶ *Taylor v. Clark*, 49 Cal. 671; *People v. Hust*, Id. 653.

⁷ *Bagley v. Adm'r of McMickle*, 9 Cal. 430.

⁸ *Caulfield v. Sanders*, 17 Cal. 569. As to parol evidence to prove contents of instruments destroyed by fire: *Collier v. Corbett*, 15 Id. 183.

⁹ *Ames v. Hoy*, 12 Cal. 11.

¹⁰ *Dunning v. Rankin*, 19 Cal. 640.

¹¹ *Lombardo v. Ferguson*, 15 Cal. 372.

of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents.¹ The plaintiff's oath that he had never had the deed was held to be insufficient to introduce parol proof of its contents.² Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for.³ To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper unless they are shown to be without the jurisdiction of the court.⁴

§ 5324. **Secondary Evidence—Possession of Adverse Party.**—There shall be no evidence of the contents of a writing other than the writing itself, except: 2. Where the original is in possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.⁵ Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear.⁶ Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so.⁷ Parol proof of a written contract and assignment thereof in writing, not admissible, so as to charge the assignee without notice to produce the original or account for its loss.⁸

§ 5325. **Secondary Evidence—Records and Public Documents.**—There shall be no evidence of the contents of a writing other than the writing itself, except: 3. When the original is a record, or other document, in the custody of a public officer.⁹ Certified copies of grants made by the surveyor general of the United States are inadmissible in evidence unless the absence of the original is accounted for.¹⁰ The *expediente*, consisting of the petition, plot, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee.¹¹ Where, to suit for goods sold and deliv-

¹ Reynolds v. Jourdan, 6 Cal. 108.

² Lawrence v. Fulton, 19 Cal. 684.

³ Brotherton v. Mart, 6 Cal. 488.

⁴ Smith v. Brannan, 13 Cal. 107.

⁵ Cal. Code C. P., sec. 1855, subd. 2.

⁶ Burke v. Table Mountain Co., 12 Cal. 403.

⁷ Poole v. Gerrard, 9 Cal. 593.

⁸ Grimes v. Fall, 15 Cal. 63; see

Jones v. Jones, 38 Id. 586.

⁹ Cal. Code C. P., sec. 1855, subd. 3.

¹⁰ Hensley v. Tarpey, 7 Cal. 288.

But see Natoma Wat. and Min. Co. v. Clarkin, 14 Id. 544.

¹¹ Gregory v. McPherson, 13 Cal. 562.

ered, defendant pleads his discharge in insolvency, it was held that in support of his plea he can offer in evidence certified copies of the decree, and of each of the papers composing the record of the insolvent proceedings, separately; and that these papers need not all be attached together, and the whole certified as one record.¹

§ 5326. **Secondary Evidence—Made by Statute.**—There shall be no evidence of the contents of a writing other than the writing itself, except: 4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.² But it does not dispense with the production of the originals, if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original.³ A recorder need not transcribe the notarial seal to the acknowledgment of a deed where the certificate states that the seal was affixed.⁴ A power of attorney, not affecting real estate, is not required to be recorded, and the fact that it acknowledges land recorded does not dispense with proof of its execution.⁵ A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not in his power or control;⁶ or that they are lost.⁷ A United States patent for land may be proved by producing from the recorder's office the book in which it is recorded, without proof of the loss of the original.⁸

§ 5327. **Secondary Evidence—Numerous Accounts.**—There shall be no evidence of the contents of a writing other than the writing itself, except: 5. When the original consists of numerous accounts or other documents, which can not be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.⁹

¹ Goldstone v. Davidson, 18 Cal. 41.

² Cal. Code C. P., sec. 1855, subd. 4; McMinn v. O'Connor, 27 Cal. 238. The act of 1851, section 21, gives to papers properly recorded the like effect as originals, but it does not dispense with proof of execution: Powell's Heirs v. Hendricks, 3 Id. 427. But this statute is changed: See Cal. Code C. P., sec. 1951.

³ Mace v. Goodwin, 6 Cal. 579; McMinn v. O'Connor, 27 Id. 238.

⁴ Jones v. Martin, 16 Cal. 165.

⁵ Stevens v. Irwin, 12 Cal. 306.

⁶ Hurlbutt v. Butenop, 27 Cal. 50.

⁷ Hicks v. Coleman, 25 Cal. 129.

⁸ Vance v. Kohlberg, 50 Cal. 346.

⁹ Cal. Code C. P., sec. 1855, subd. 5. In cases mentioned in subdivisions 3 and 4, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents: Id. This section is limited to proof of the contents of the writing.

The fact of the making of the writing may be proved by parol.¹ The acts of a corporation by its board of directors may be proved by parol, where by mistake they were not entered on the minutes.²

CHAPTER IX.

SUBMITTING CONTROVERSY WITHOUT ACTION.

§ 5328. **In General.**—Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties.³ Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll,⁴ and may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.⁵ Where an appeal is taken from a decision of the justice's court in such a case, the transcript on appeal must contain a copy of the affidavit required by the same section, showing the reality of the controversy and good faith of the proceeding.⁶ Where instead of this affidavit the record only showed an allegation in the agreed statement on appeal that the cause was heard in the court below on an agreed statement of facts, and the affidavit of the defendant that the controversy was real, the appeal was dismissed.⁷ Where the parties to a controversy make an agreed case, under section 377 of the California practice act,⁸ which was submitted for decision to the district court, the consideration of the court is restricted to the facts submitted in the case.⁹ Where the plaintiff claimed that the defendant was indebted to him, and under the section above referred to a case was made and submitted stating the facts agreed upon between the parties, upon which the district court decided that plaintiff's demand was not established without proof of other additional facts, it

¹ Poole v. Gerrard, 9 Cal. 594; Sais v. Sais, 49 Id. 264.

² Bay View Homestead Ass'n v. Williams, 50 Cal. 353.

³ Cal. Code C. P., sec. 1138.

⁴ Id., sec. 1139.

⁵ Cal. Code C. P., sec. 1140.

⁶ Mellois v. Chaine, 20 Cal. 679.

⁷ Id.

⁸ Cal. Code C. P., sec. 1138.

⁹ Crandall v. Amador County, 20 Cal. 72.

was held that it was error for the court, instead of rendering judgment for the defendant, to make an order based upon the supposition that plaintiff established such other facts.¹

§ 5329. Submission of Controversy without Action.

Form No. 1188.

[TITLE SAME AS IN PLEADING.]

The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The facts agreed on are as follows [set forth facts as agreed].

The points in controversy, and upon which the decision of the court is asked, are as follows [state points in controversy].

[DATE.]

[SIGNATURES.]

§ 5330. Affidavit to Submission.

Form No. 1189.

[VENUE.]

A. B. and C. D., the parties to the foregoing case, being duly severally sworn, each for himself says that the controversy set forth in the foregoing submission is real, and the proceedings in good faith to determine the rights of the said parties.

[JURAT.]

[SIGNATURES.]

CHAPTER X.

TAKING DEPOSITIONS.

§ 5331. When may be Taken.—The testimony of a witness in California may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases: 1. Where the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended; 2. Where the witness resides out of the county in which his testimony is to be used; 3. Where the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required; 4. Where the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend; 5. Where the testimony is required upon a motion, or any other case where the oral examination of the witness is not required.²

¹ *Crandall v. Amador County*, 20 Cal. 72. ² Cal. Code C. P., sec. 2021.

§ 5332. **Before Whom Taken.**—Depositions in this state may be taken before any judge or officer authorized to administer oaths.¹ An affidavit taken in another state of the United States to be used in this state may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public, or before a judge or clerk of a court of record having a seal.² Any affidavit taken in a foreign country to be used in this state may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country.³

§ 5333. **Competency of Witness.**—To make the testimony of a witness admissible, he must be competent at the time of taking deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him.⁴ Where the parties stipulated that a deposition which had been taken in another action should be used on the trial, “with the same force and effect, subject to the same exceptions, as if taken in this case,” and the party objecting had attended at the examination in such former case without objecting to the competency of the witness,” it was held that the stipulation was a waiver of any objections to the competency of the witness.⁵

§ 5334. **How Taken.**—Where a deposition of a party to the suit is taken *ex parte*, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it.⁶ A party who appears at the taking of a deposition and examines the witness, without objecting to his competency, can not afterwards interpose that objection.⁷ The deposition of a party to a civil action may be taken, notwithstanding he is confined in jail.⁸

§ 5335. **When Admissible.**—Depositions, if properly taken, may be used by either party upon the trial, against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial unless the

¹ Cal. Code C. P., sec. 2031.

² Id., sec. 2013.

³ Id., sec. 2014.

⁴ Kimball v. Gearhart, 12 Cal. 27.

⁵ Brooks v. Crosby, 22 Id. 42.

⁶ Spring v. Hill, 6 Cal. 17; see Cal. Code C. P., sec. 2033.

⁷ Brooks v. Crosby, 22 Cal. 42.

⁸ Maxwell v. Rives, 11 Nev. 213.

As to how depositions must be taken when taken out of the state, see Cal. Code C. P., secs. 2024–2028; when taken within the state, see Id., secs. 2031–2038.

same was stated at the time of the examination.¹ The only legal exception which is waived if not made at the taking, where the party attends, is as to the form of the interrogatory.² But objection must be made when the deposition is offered in evidence.³ A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial.⁴ The deposition of a surveyor who ran the boundary line of a grant, taken in one action, is admissible in another action between different parties, as hearsay evidence upon the location of such lines, after his death. Hence, the deposition of Vioget as to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties.⁵

§ 5336. Affidavit for Examination of Witness.

Form No. 1190.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action.

II. The summons in said action has been served. P. Q. is a witness material and necessary for me on the trial of said action, without the benefit of whose testimony I can not safely proceed to trial; said witness resides in the county of, and is about to leave said county, where said action is pending and is to be tried, and will probably continue absent when his testimony is required. [Or state other facts showing that the case is within section 2021 of the California code of civil procedure.]

III. I am informed and verily believe that it is the intention of said witness to depart from said county, on the day of, 18. . . . I was not aware of his intended departure in time to give five days' notice of the time and place of taking his deposition; and the attorneys for the said defendant reside at, in said county.

[JURAT.]

[SIGNATURE.]

§ 5337. Affidavit on Motion for Commission to Examine Witness out of State.

Form No. 1191.

[TITLE.]

[VENUE.]

A. B., the plaintiff in the above-entitled action, being duly sworn, deposes and says:

¹ If the deposition be taken under the witness: Cal. Code C. P., sec. subdivisions 2, 3, or 4 of section 2021, 2032.

proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition may also be read in case of the death of

² Lawrence v. Fulton, 19 Cal. 684.

³ Hobbs v. Duff, 43 Cal. 485.

⁴ Turner v. McIlhaney, 8 Cal. 575.

⁵ Morton v. Folger, 15 Cal. 275.

That the summons in the said action has been served, and that P. Q. is a witness material and necessary for the said [plaintiff] on the trial of the said action, without the benefit of whose testimony the said [plaintiff] can not safely proceed to trial; that said witness resides in the city of [New York, in the county of New York, in the state of New York], and is out of this state, and will continue absent when his testimony is required.

[JURAT.]

[SIGNATURE]

§ 5338. **By Whom Made.**—This affidavit may be made by any person acquainted with the facts, if no stay of proceedings is desired.¹ But if otherwise, it will be better that the affidavit should be made by the applicant, or an excuse given for its not being so made.²

§ 5339. **What It must Show.**—It is not necessary to state what facts are expected to be proved by the witness.³ And advice of counsel as to the same,⁴ that witness is absent and will continue absent, must be stated.⁵

§ 5340. **Notice of Taking Deposition of Witness, and Time and Place of Examination, with Copy of Affidavit.**

Form No. 1192.

[TITLE.]

You will please take notice that the depositions of L. M. and N. O., on behalf of the plaintiffs in the above-entitled action, to be used on the trial thereof, will be taken before P. Q., a notary public in and for the county of, in the state of California, at his office in the city of, county of, on the day of, A. D. 18.., between the hours of nine A. M. and five P. M. of that day; and if not completed on that day, the taking will be continued from day to day successively thereafter, and over Sundays, at the same place, until completed.

And you will further take notice that the annexed is a copy of an affidavit of S. T., one of the said plaintiffs, showing that the case is one mentioned in section 2021 of the California code of civil procedure.

E. F.,

[DATE AND ADDRESS.]

Attorney for Plaintiffs.

¹ De Mar v. Van Zandt, 2 Johns. Cas. 69.

² See Eaton v. North, 7 Barb. 631. See, as to postponement, Cal. Code C. P., sec. 2027.

³ Eaton v. North, 7 Barb. 631. As to the materiality of the witness, Id.

⁴ Beall v. Dey, 7 Wend. 513.

⁵ Pooler v. Maples, 1 Wend. 65. As to requisites of affidavit under the New York practice, see Seymour v. Strong, 19 Id. 98; Warner v. Harvey, 9 Id. 444; Brackett v. Dudley, 1 Cow. 209.

§ 5341. **Order Shortening Time of Notice.***Form No. 1193.*

Good cause being shown therefor, it is hereby ordered that the time of giving the foregoing notice is hereby shortened to two days.

A. B.,

[DATE.]

Judge.

§ 5342. **Notice.**—The party desiring to take a deposition within this state must serve on the adverse party a previous notice of the time and place of examination, together with a copy of an affidavit showing that the case is one mentioned in the statute. Such notice must be at least five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.¹ Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule.² Notice must be served upon the attorney for the party, where he has one.³ But proof of service of the notice may be made by parol testimony.⁴ A slight error in the title of the cause, where there is no other suit pending between the parties, will not invalidate the notice.⁵

§ 5343. **Waiver of Objections.**—An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short.⁶

§ 5344. **Notice of Motion for Commission to Examine Witness out of State.**

Form No. 1194.

[TITLE.]

The defendant and his attorney will please take notice that upon the within affidavit, and upon the complaint and the papers filed in the above-entitled action, I shall move this honorable court, at the court-room thereof, in the county of, on the day of, A. D. 18.., at the opening of the court on that day, or as soon thereafter as counsel can be heard, that a commission issue out of and under the seal of this honorable court, to take the testimony of F. G., a witness residing out of this state, directed to some proper person residing at the

¹ Cal. Code C. P., sec. 2031.⁴ Hobbs v. Duff, 43 Cal. 485.² Williams v. Chadbourne, 6 Cal. 559.⁵ Mills v. Dunlap, 3 Cal. 94; see also Cal. Code C. P., sec. 1046.³ Griffith v. Gruner, 47 Cal. 644; Cal. Code C. P., sec. 1015.⁶ Jones v. Love, 9 Cal. 68.

city of, in the state of, then and there to be selected and appointed by the judge of this court.

E. F.,

[DATE.]

Attorney for Plaintiff.

§ 5345. Stipulation that Deposition of Witness may be Taken in This State to be Used on the Trial.

Form No. 1195.

[TITLE.]

It is hereby stipulated that the deposition of R. S., a witness on behalf of the [plaintiff] in the above-entitled action, may be taken before T. U., a notary public [or any other officer or person agreed upon, in and for the county of, in this state, at his office in said county, on the . . . day of, 18.., between the hours of . . . A. M. and . . . P. M. of that day, and if not completed on that day, may be continued from day to day thereafter, and over Sundays, at the same place, until completed. And when so taken, the said deposition may be used on the trial of said action, subject to the same objections (except as to the form of interrogatories), as if the said witness were there personally present and testifying therein.

G. H.,

[DATE.]

Attorney for Defendant.

§ 5346. Order for Commission to Take Testimony.

Form No. 1196.

[TITLE.]

Upon reading and filing the affidavit of A. B., and upon the files, papers, and records in this action, and due proof of service of notice of motion having been made and filed, on motion of G. H., esq., attorney for the defendant in said action:

It is ordered that a commission issue out of and under the seal of this court, directed to J. K., a person agreed upon between the parties, residing at the city of, county of, in the state of, to take the testimony of P. Q., residing at the same place, as a witness on behalf of the defendant, upon such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties shall disagree as to their form, by the honorable judge of this court, on the . . . day of, 18.., at . . . o'clock in thenoon, at the court-room of this court.

§ 5347. Commission to Take Testimony.

Form No. 1197.

The people of the state of California to A. B., greeting:

Whereas it appears to our judge of our superior court of the county of, state of California, that, of the

..... of, in the of, material witness in a certain action now pending in our said superior court, between, plaintiff, and, defendant, and that the personal attendance of said witness can not be procured at the trial of the said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine said witness, and therefore we authorize and empower you, at certain days and places, to be by you for that purpose appointed, diligently to examine said witness on the interrogatories annexed to his commission, and upon, on oath, first taken before you, and cause the said examination of the said witness to be reduced to writing and signed by the same witness and by yourself, and then return the same annexed to this commission, unto our superior court aforesaid, with all convenient speed, inclosed under your seal.

Witness, Hon., judge of the said superior court, at the, in the county of, this day of, A. D. 18..

Attest my hand and seal of said superior court, the day and year last above written.

C. D.,

[SEAL OF COURT.]

Clerk

§ 5348. **Commission, What to Contain.**—In general, witnesses to be examined under a commission must be named in it.¹ Where the names are not known to the party, if they are sufficiently described, and their evidence is shown to be material, the commission may be issued describing them.² The want of a seal to the commission is a fatal defect.³

§ 5349. **Interrogatories, Settlements of.**—Documents to be identified by the witness, or copies of them, may be annexed to the interrogatories;⁴ and it is not essential that the originals should be thus attached.⁵ Nor can either party be compelled to surrender an original document for this purpose.⁶ Objections annexed to the commission and interrogatories, but not called to the attention of the court on the trial, may properly be disregarded.⁷

¹ Wright v. Jessup, 3 Duer, 642; Forrest v. Forrest, 3 Bosw. 661; S. C., 9 Abb. Pr. 289.

² Shafer v. Wilcox, 2 Hall, 502. As to the effect of a misnomer, compare Hays v. Phelps, 1 Sandf. 64; Brown v. Southworth, 9 Paige Ch. 351; Blackett v. Laimbeer, 1 Sandf. Ch. 366.

³ Ford v. Williams, 24 N. Y. 359; Tracy v. Suydam, 30 Barb. 110; Whitney v. Wyncoop, 4 Abb. Pr. 370.

⁴ Commercial Bank v. Union Bank, 11 N. Y. 203.

⁵ Id.

⁶ Butler v. Lee, 32 Barb. 75; S. C., 19 How. Pr. 383.

⁷ Farrell v. Palmer, 36 Cal. 187. As to the practice of settlement under the California practice, and that examination may be without interrogatories, consult Cal. Code C. P., sec. 2025.

§ 5350. **Issuance of Commission.**—If a commission to take the deposition of a witness out of the state is issued on the application of one party without consent of the other, to a person who is not a judge or justice of the peace, or a commissioner appointed by the governor of this state, and the party who does not consent, after the appointment, files cross-interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the commissioner was improperly appointed.¹ If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken.²

§ 5351. **Return.**—It is not essential, though it is the better practice, that the return should state that the witnesses were publicly sworn.³ The direction of the officer who settles the interrogatories should be indorsed on the commission.⁴

§ 5352. **Deposition.**

Form No. 1198.

[TITLE.]

Be it remembered, that pursuant to the stipulation [commission or notice] hereunto annexed, and on the day of 18.., at my office, in the county of, state of, before me, N. O., a notary public in and for the said county of, duly appointed and commissioned to administer oaths, etc., personally appeared P. Q., a witness produced on behalf of the plaintiff in the above-entitled action now pending in the said court, who, being first by me duly sworn, was then and there examined and interrogated by E. F., of counsel for the said plaintiff, and by G. H., of counsel for the said defendant, and testified as follows [questions and answers].

§ 5353. **Deposition as Evidence.**—A deposition may be used at any stage of the action or proceeding.⁵ The object of the statute is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken.⁶ Where a deposition had been taken in a case and subsequently an amended pleading was filed, it was held that the deposition might nevertheless be read, if the material issues on the subject-

¹ Crowther v. Rowlandson, 27 Cal. 383.

² Elgin v. Hill, 27 Cal. 373.

³ Williams v. Eldridge, 1 Hill, 249; Halleran v. Field, 23 Wend. 38. As to the directions for a return, see Hall v. Barton, 25 Barb. 274.

⁴ Hurd v. Pendright, 2 Hill, 502; Crawford v. Lopes, 25 Barb. 449.

⁵ Cal. Code C. P., sec. 2034.

⁶ Turner v. McIlhaney, 8 Cal. 575.

matter to which it related were the same under the amended as under the original pleadings.¹ A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial.² The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other.³ But *quære*, whether a party can object, on second trial, to the reading of a deposition which he suffered his adversary to read on the first trial without objection.⁴

§ 5354. **Deposition Excluded.**—A whole deposition can not be excluded on the ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions, otherwise any error in permitting the questions will be waived.⁵ It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk.⁶

§ 5355. **Exceptions.**—Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination.⁷ There is nothing in the statute which requires that exception to deposition shall be filed before the time of trial. The objection can be made at any time before they are read in evidence.⁸ If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing.⁹

§ 5356. **Form of Deposition.**—The deposition of each witness must be reduced to writing under the direction of the commissioners,¹⁰ and be subscribed by the witness.¹¹ And must be certified by the commissioners, who must make a return of the same in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other channel of conveyance.¹²

§ 5357. Certificate of Notary.

Form No. 1199.

State of California, }
City and county of } ss.

I, G. H., a notary public in and for said county, do

¹ *Pio Pico v. Cuyas*, 47 Cal. 174.

² *Mills v. Dunlap*, 3 Cal. 94.

³ *People v. Kohler*, 5 Cal. 72.

⁴ *Myers v. Casey*, 14 Cal. 542.

⁵ *Higgins v. Wortell*, 18 Cal. 330.

⁶ *Williams v. Chadbourne*, 6 Cal. 559.

⁷ *Lawrence v. Fulton*, 19 Cal. 683.

⁸ *Dye v. Bailey*, 2 Cal. 384.

⁹ *Myers v. Casey*, 14 Cal. 542.

¹⁰ *Keane v. Meade*, 3 Pet. 1; *McDonald v. Garrison*, 9 Abb. Pr. 34.

¹¹ But see *Clarke v. Sawyer*, 3 Sandf. Ch. 351.

¹² Cal. Code C. P., sec. 2026.

hereby certify that the witness P. Q., in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned in the annexed stipulation [commission or notice], to wit, at my office in said county of, in the state of, and on the day of, 18.., between the hours of and of that day; that said deposition was reduced to writing by me, and when completed was by me carefully read to said witness; and being by him corrected, was by him subscribed in my presence

In witness whereof I have hereunto subscribed my name and affixed my seal of office, this day of, 18..

G. H.,

Notary Public.

§ 5358. **Attestation.**—A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute. The admission of hearsay testimony to a fact admitted by both parties is not error.¹ The attestation or certificate of a notary that an affidavit was sworn to, or affirmed and subscribed before him, is regular, although his seal is not affixed.² Courts take judicial notice of the official character of justices of the peace in their own states. And an affidavit in which the official character of the justice before whom it is taken does not appear is good.³ And where it was stipulated by the attorneys for the parties that a deposition might be taken before L. P. F., a justice of the peace in a foreign country, it was held that this was a concession that there was such a person occupying such office, and an agreement upon that person to take the deposition.⁴

§ 5359. **Certificate of Commissioner.**—If at the end of a deposition taken by a commissioner out of the state there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of compliance with section 430 of the California practice act⁵ should be dated.⁶ It is not necessary to append the statutory certificate to the deposition of each witness when two or more give their depositions for the same party at the same time, and before the same officer; one certificate in due form to all such depositions when securely attached together is sufficient.⁷

¹ Williams v. Chadbourne, 6 Cal. 559.

² Mills v. Dunlap, 3 Cal. 97.

³ Ede v. Johnson, 15 Cal. 53.

⁴ Blackie v. Cooney, 8 Nev. 41.

⁵ Cal. Code C. P., sec. 2032.

⁶ Elgin v. Hill, 27 Cal. 373.

⁷ Pralus v. Pacific G. & S. M. Co., 35 Cal. 30.

§ 5360. **Certificate of Mailing—Indorsed on the Envelope.**

Form No. 1200.

Deposited in the post-office at and the postage thereon paid by me, this day of, 18.. [signature of, commissioner].

CHAPTER XI.

TENDER.

§ 5361. **In General.**—Section 2074 of the California code of civil procedure provides that “an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property;” otherwise, in order to constitute a valid tender, the money or thing must be produced. The production of it must be proved, with an actual offer of it to the creditor, unless it be shown that the latter dispensed with it by some positive act or declaration to that effect. Having the money in one’s pocket or elsewhere, and offering to pay without producing the money, is not enough; there must be an actual offer and presentation, so that the creditor can either take or refuse it at his option;¹ and it must be unconditional;² except such conditions as were by the terms of the contract conditions precedent to the performance thereof.³ So an offer to pay, provided the other party will give a receipt in full, is not a sufficient tender.⁴ But a receipt for the money paid, or for the delivery of an instrument or property, may be demanded as a condition of the payment or delivery.⁵ And the tender must be kept at all times ready for payment.⁶

¹ Bakeman v. Podler, 15 Wend. 637; Dunham v. Jackson, 6 Id. 22; Strong v. Blake, 46 Barb. 227; Englander v. Rogers, 41 Cal. 420.

² Roosevelt v. Bull’s Head Bank, 45 Barb. 579.

³ Wheelock v. Tanner, 39 N. Y. 481.

⁴ Clark v. Mayor of N. Y., 1 Keyes, 9.

⁵ Cal. Code C. P., sec. 2075.

⁶ Roosevelt v. Bull’s Head Bank, 45 Barb. 579; Redington v. Chase, 34 Cal. 666; Bryan v. Maume, 28 Id. 238; Cal. Code C. P., sec. 1830; see, as to tender generally, Karker v. Haverly, 50 Barb. 79; Clark v. Mayor, 1 Keyes, 9; Cal. Civil Code, secs. 1485

to 1505. Under the statute of California and decisions of our courts, see generally Cal. Code C. P., secs. 704, 1030, 2074, and 2075. On sale and delivery: Id.; Lamott v. Butler, 18 Cal. 32. Money tender: Curia v. Abadie, 25 Id. 502. As to legal tender notes, see Vilhac v. Biven, 28 Id. 409. When necessary to maintain action: Folsom v. Bartlett, 2 Id. 163; Vance v. Dingley, 14 Id. 53; Crosby v. Watkins, 12 Id. 85. When not necessary: See Goodale v. West, 5 Id. 339. By whom made: Mahler v. Newbaur, 52 Id. 168. See generally People v. Hays, 4 Id. 127; Gaven v. Hagen, 15 Id. 208; Redington v. Chase, 34 Id. 666; Id. 616.

§ 5362. **Effect of Tender.**—Where, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff can not recover costs, but must pay costs to the defendant.¹ In such case, judgment should be for the plaintiff for the amount tendered, and for the defendant for his costs.² The defendant, to entitle himself to costs, must not only aver a tender, but that he has always been and is ready to pay the sum tendered, and must bring it into court.³ A tender of the principal and interest to the date of the tender stops interest from the time of the tender.⁴ A tender of the amount due on a debt secured by a mortgage does not release the lien.⁵

§ 5363. **Objections to Tender.**—The person to whom a tender is made must, at the time, specify any objections he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.⁶

¹ Cal. Code C. P., sec. 1030.

² Curia v. Abadie, 25 Cal. 502.

³ Bryan v. Maume, 28 Cal. 238.

⁴ Patterson v. Sharp, 41 Cal. 133;
Cal. Civil Code, sec. 1504.

⁵ Perre v. Castro, 14 Cal. 530;

Himmelman v. Fitzpatrick, 50 Id. 650; see also Hawkins v. Hill, 15 Id. 499; Mahler v. Newbaur, 32 Id. 168.

⁶ Cal. Code C. P., sec. 2076; Oakland Bank of Sav. v. Applegarth, 4 West Coast Rep. 605.

PART FIFTEENTH.

CERTIORARI, MANDAMUS, ETC.

CHAPTER I

CERTIORARI, OR WRIT OF REVIEW.

§ 5364. **In General.**—The writ of *certiorari* may be denominated the writ of review.¹ When a new jurisdiction, unknown to the common law, is created by the statute, a writ of error will not lie, but a *certiorari* will.² So, in the absence of express prohibition, when a court acts in a summary manner, or in a new course different from the common law, *certiorari* will lie.³ It is issued from a superior court, directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.⁴ It is usually employed to review the proceedings of courts not of record, municipal corporations, special tribunals, commissioners, and officers exercising judicial powers which affect the citizen in his rights or property, and acting in a summary way.⁵ It is sometimes used as an auxiliary process, in order to obtain a full return to some other process, as in case of a diminution of record in an appeal it may be awarded to require a perfect transcript of all the papers.⁶ At common law, the writ of *certiorari* tries nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. The review never extends to the merits; upon these the action of

¹ Cal. Code C. P., sec. 1067.

² 2 Tidd, 1051; Campbell v. Strong, Hempst. 195.

³ Tierney v. Dodge, 9 Minor, 168.

⁴ Bac. Abr. h, t; 4 Vin. Abr. 330; Bonv. 215; Commissioners etc. v. Supervisors etc., 27 Ill. 140.

⁵ Puterbaugh's Pl. & Pr. 543.

⁶ Holmes v. Parker, 1 Scam. 567;

Jones v. Sprague, 2 Id. 55; Sweet v. Overseers etc., 3 Johns. 23; Brown v. Osborne, 1 Blackf. 32; Stewart v. Ingle, 9 Wheat. 526; Scott v. Hull, 2 Munf. 229; Colden v. Knickerbocker, 2 Cow. 38; Smick v. Opdyke, 7 Halst. 85; Clark v. Hackett, 1 Blackf. 77; Barton v. Petit, 7 Cranch, 288; Field v. Milton, 3 Id. 514.

the inferior tribunal is final and conclusive, and our statute is affirmatory of the common law.¹

§ 5365. **Jurisdiction to Issue Writ.**—The supreme court of the state of California may exercise its appellate jurisdiction by means of the writ of *certiorari*,² but not where the review might have been had by an appeal,³ unless possibly under extraordinary circumstances.⁴ If there is any other plain, speedy, and adequate remedy, the writ of *certiorari* will not lie.⁵ It may issue the writ to the district court for the purpose of reviewing summary proceedings, where no appeal would lie,⁶ or to inferior courts, in every case within its reach, where such courts exceed their powers.⁷ But its jurisdiction to review the proceedings of inferior courts, boards, and officers, upon *certiorari*, is limited to cases where there has been an excess of jurisdiction,⁸ it being one of the principal objects of the writ to keep inferior courts and tribunals within their jurisdiction.⁹ The amended constitution confers upon the supreme court original jurisdiction in the issuance of this writ.¹⁰ A writ of review may be granted by any court, except a police or justice's court, where an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.¹¹ Superior judges have power to issue writs of *certiorari*, and to hear them on their return at chambers.¹² It is not necessary that a court have appellate jurisdiction; the writ may issue from a superior court to an inferior judge.¹³ But where the error complained of might have been corrected by appeal to the county court, district courts

¹ *People v. Board of Delegates etc.*, 14 Cal. 479; Cal. Code C. P., sec. 1074.

² *People v. Turner*, 1 Cal. 144.

³ *Milliken v. Huber*, 21 Cal. 166; *Bennett v. Wallace*, 43 Id. 25; *Faut v. Mason*, 47 Id. 8; *Slavonic etc. Ass'n v. Superior Court*, 3 West Coast Rep. 524.

⁴ *Keys v. Marin Co.*, 42 Cal. 254.

⁵ Cases cited *supra*, and *People v. Turner*, 1 Cal. 152; *People v. Board of Delegates etc.*, 14 Id. 498.

⁶ *People v. Turner*, 1 Cal. 144.

⁷ *In re Hanson*, 2 Cal. 263; *California Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Id. 528.

⁸ *People v. Johnson*, 30 Cal. 98; *State etc. v. Fifth District Court*, 1 West Coast Rep. 630; *Nunan v. Superior Court*, 3 Id. 433.

⁹ *Combs v. Dunlap*, 19 Wis. 591.

¹⁰ *Miller v. Board of Supervisors*, 25 Cal. 95.

¹¹ Cal. Code C. P., sec. 1068.

¹² *People v. Supervisors of Marin Co.*, 10 Cal. 346.

¹³ *Chard v. Harrison*, 7 Cal. 113; *People v. Board of Supervisors*, 8 Id. 58. See, as to review of the action of a board of supervisors in the granting of a ferry license, *Murray v. Board of Supervisors*, 23 Id. 493; *Rex v. Inhabitants*, 1 Ld. Raym. 580; *Lawton v. Commissioners of Cambridge*, 2 Cai. 179; *Le Roy v. Mayor of New York*, 20 Johns. 430; *Lynde v. Noble*, Id. 80; *Bradhurst v. First Great S. W. Turnpike Co.*, 16 Id. 80; *Ex parte Mayor of Albany*, 23 Wend. 277.

can not entertain jurisdiction by *certiorari*.¹ The paraphrase in the California constitution, "all cases at law which involve the title or possession to real property," as given in *Holman v. Taylor*, 31 Cal. 338, would be more correct if given in this language: "Cases at law in which the title or right of possession of real property is a material fact in the case upon which the plaintiff relies for a recovery or the defendant for a defense." It was not intended by the constitution to withdraw from justices of the peace jurisdiction in actions of trespass, founded upon the possession of real estate, but only where the right of possession was an issuable fact in the case.²

§ 5366. **When It will Lie.**—There must have been an excess of jurisdiction before the court can interfere by *certiorari*.³ Its office is to bring up for review final determinations and adjudications of inferior tribunals, etc.⁴ Where error has occurred in proceedings, either civil or criminal, which can not be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given.⁵ So in case of an order of the district court fining and imprisoning for a contempt, without setting forth the facts.⁶ When the appellant claims that the statement is necessary, as the errors upon which he relies appear upon the face of the record, the court errs in overruling the objection, as it was error within, and not an excess of jurisdiction, for which relief can be had by *certiorari*.⁷ So where a writ of *mandamus* was issued by the county clerk, commanding the clerk to issue a writ of restitution upon *remittitur* filed in the district court.⁸ So where a county court exercises the power in a judicial capacity which properly belongs to the board of supervisors in a non-judicial capacity, as the granting of a ferry license.⁹ So where a board exercises a judicial power, as rendering a decision in a contested election case; whether the board has exceeded its jurisdiction is properly subject to review on *certiorari*.¹⁰ As to how far and when the proceedings of such boards are judicial, and hence reviewable on *certiorari*, and how far and when legislative, and hence not so to be reviewed, discussed.¹¹ A writ of *certiorari* will lie in

¹ *Gray v. Schupp*, 4 Cal. 185.

² *Pollock v. Cummings*, 38 Cal. 685.

³ *Coulter v. Stark*, 7 Cal. 245; *Wrat-ten v. Wilson*, 22 Id. 465; *Winter v. Fitzpatrick*, 35 Id. 269.

⁴ *People v. County Judge*, 40 Cal. 480.

⁵ *People v. Turner*, 1 Cal. 152.

⁶ *Ex parte Field*, 1 Cal. 187.

⁷ *People v. Burney*, 29 Cal. 459.

⁸ *Clary v. Hoagland*, 5 Cal. 476.

⁹ *Chard v. Harrison*, 7 Cal. 113.

¹⁰ *People etc. v. Board of Delegates etc.*, 14 Cal. 479.

¹¹ *Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208; see also *Supervisors etc. v. Briggs*, 2 Denio, 26; *Orange Co. B'k v. Brown*, 9 Wend. 108; *Gillespie v. Broas*, 23 Barb. 370; *Fall v. Paine*, 23 Cal. 303.

the district court to review the action of the board of supervisors,¹ when partaking of a judicial character;² but not when purely legislative.³ So where the board of supervisors reject an official bond for any other reason than that it is not in form and substance in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties.⁴ Where plaintiff seeks to enjoin a sale of personal property, under an execution issued upon a judgment recovered against him in a justice's court, if the time for appeal has elapsed, he can apply to the county court for a writ of *certiorari*, and thus review the action of the justice in rendering the judgment so far as the question of jurisdiction is concerned.⁵ In Michigan it will lie to review the order of the circuit court.⁶ In Wisconsin, applications to the supreme court for writs of *certiorari* to justices of the peace will not be entertained unless satisfactory reasons are shown for not obtaining the same from a circuit court or judge.⁷ A judgment in a justice's court void for want of jurisdiction will be reversed on *certiorari*.⁸ In Minnesota it will lie to review the action of the circuit court in certain proceedings not subject to appeal.⁹ It lies from the probate court to a justice's court.¹⁰ The circuit court of the district of Columbia has jurisdiction to issue a *certiorari* to a justice of the peace in a case of forcible entry and detainer.¹¹

§ 5367. **When the Writ will not Lie.**—A writ of *certiorari* is not the proper remedy where there has been no excess of jurisdiction. If it had jurisdiction, but decided wrongly, *certiorari* will not lie;¹² or merely from defect of jurisdiction.¹³ Where the superior court has not exclusive or original jurisdiction, a *certiorari* can not be maintained.¹⁴ It does not lie to an inferior tribunal, except to remove proceedings which remain before it.¹⁵ A *certiorari* to the board of supervisors, on the

¹ *People v. Supervisors El Dorado Co.*, 8 Cal. 59.

² *Hastings v. City and County of San Francisco*, 18 Cal. 49.

³ *Williams v. Supervisors*, 2 West Coast Rep. 732.

⁴ *Miller v. Board of Supervisors etc.*, 25 Cal. 94.

⁵ *Comstock v. Clemens*, 19 Cal. 78.

⁶ *Jerome v. Williams*, 13 Mich. 521.

⁷ *Hurlbut v. Wilcox*, 19 Wis. 419.

⁸ *Combs v. Dunlap*, 19 Wis. 591.

⁹ *Faribault v. Hulett*, 10 Minn. 30.

¹⁰ *Paul v. Armstrong*, 1 Nev. 82.

¹¹ *Holmead v. Smith*, 5 Cranch C. C. 343; *United States v. Browning*, 1 Id.

500; *United States v. Donahoe*, Id. 474.

¹² *People v. Burney*, 29 Cal. 460; *People v. Dwinelle*, Id. 635; *Barber v. San Francisco*, 42 Id. 630; *Yenawine v. Richter*, 43 Id. 312; *Petty v. County Court etc.*, 45 Id. 246; *Monreal v. Bush*, 46 Id. 79; *C. P. R. R. Co. v. Placer Co.*, Id. 670; *Reynolds v. County Court etc.*, 47 Id. 604; *Coulter v. Stark*, 7 Id. 244.

¹³ *Fowler v. Lindsey*, 3 Dall. 411; to the contrary, *Kennedy v. Gorman*, 4 Cranch C. C. 347.

¹⁴ *Fowler v. Lindsey*, 3 Dall. 411.

¹⁵ *People v. Highway Commissioners*, 30 N. Y. 72.

ground of want of jurisdiction, is premature, if taken before the action of the board,¹ as a *certiorari* is not allowed before the case is finally adjudicated below.² So in case of forcible entry and detainer it is premature until there is something to remove.³ So in proceedings before the board of supervisors.⁴ It ought not to issue after a limit of a writ of error.⁵ It will not lie after five years.⁶ *Certiorari* will not lie in case of property taken for public use without compensation;⁷ nor in case of a resolution of a board of supervisors to raise money upon the credit of the county;⁸ nor to review proceedings of tax commissioners after the assessment rolls have been delivered;⁹ nor, it seems, where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for commitment;¹⁰ nor to bring proceedings in insolvency cases before the supreme court;¹¹ nor to bring up for review an erroneous decision of the county court in overruling a demurrer;¹² nor to review the action of the district court in punishing as for contempt.¹³ It will not lie to bring up proceedings of a justice against tenants holding over.¹⁴

§ 5368. **What Subject to Review.**—The jurisdiction of the supreme court, on appeal from a judgment of the superior court rendered in a *certiorari* case, does not depend upon the amount in controversy. The only question the supreme court looks into is to ascertain whether the inferior tribunal, board, or officer had jurisdiction, and if not, whether there is any appeal or other plain, speedy, and adequate remedy.¹⁵ The supreme court, on *certiorari*, will only inquire whether the inferior court exceeded its jurisdiction.¹⁶ It can not review mere errors of law of the county court, in cases where it has jurisdiction,

¹ *Wilson v. Supervisors*, 3 Cal. 386.

² *Lynde v. Noble*, 20 Johns. 80; *Husted's Case*, 17 Abb. Pr. 326.

³ *Haines v. Backus*, 4 Wend. 213.

⁴ *Lynde v. Noble*, 20 Johns. 80; *People v. Bogart*, 3 Abb. Pr. 194; *Boughton v. Smith*, 26 Barb. 637; *People v. Livingston Co.*, 43 Id. 232.

As to limitation of time in which to apply for writ of *certiorari* in cases of the review of assessments, see *People ex rel. Metropolitan Bank v. Commissioners of Taxes*, 43 Barb. 494.

⁵ *Elmendorf v. Mayor of N. Y.*, 25 Wend. 693; *People v. Mayor of N. Y.*, 2 Abb. Pr. 9.

⁶ *Vaughn v. Marshall*, 1 Houst. 348.

⁷ *People ex rel. Cook v. Nearing*, 27 N. Y. 306.

⁸ *People ex rel. Dickenson v. Supervisors*, 43 Barb. 232.

⁹ *People v. Commissioners of Taxes*, 43 Barb. 494.

¹⁰ *Walton v. Gatlin*, 1 Wins. (N. C.) 318.

¹¹ *People etc. v. Shepard*, 28 Cal. 115.

¹² *People etc. v. Burney*, 29 Cal. 459.

¹³ *People etc. v. Dwinelle*, 29 Cal. 632.

¹⁴ *Lenox v. Arguelles*, 4 Cranch C. 477.

¹⁵ *Winter v. Fitzpatrick*, 35 Cal. 269.

¹⁶ *People v. Dwinelle*, 29 Cal. 632; *People ex rel. Porter v. City of Rochester*, 21 Barb. 656; *People v. Overseers*, 6 How. Pr. 25; *Stone v. Mayor of New York*, 25 Wend. 157.

even though there is no appeal;¹ it can not review questions of fact;² though the review by the courts extends to every issue of law and fact involved in the question of jurisdiction;³ but it never extends to the merits.⁴ *Certiorari* tries nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends.⁵ The decision of the inferior court, establishing the existence of a fact essential to the exercise of its jurisdiction, is subject to review on *certiorari*.⁶ Except in cases of fraud, an order allowing a claim against a county by a board of supervisors must be reviewed by *certiorari*.⁷ The decision of the board of delegates, in the case of a contested election for chief engineer, is a judicial decision, and subject to review by the courts on *certiorari*. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction.⁸ A *certiorari* can not be sued by a purchaser of property who was not a party to the proceedings for seizure, as his rights are not affected thereby.⁹ The test as to the right of review is whether the person seeking to review was a party to the proceeding sought to be reviewed;¹⁰ and where a party has no interest in the proceedings, he can not prosecute a *certiorari*.¹¹

§ 5369. Writ of Certiorari to Review Acts of a Board of Supervisors.

Form No. 1201.

[TITLE.]

The people of the state of California to the board of supervisors of the county of

Whereas it has appeared to us by the affidavit of, that lately before you, or a majority of you, composing at the time the board of supervisors of the county of, such proceedings have been had that you, or a majority of you, have irregularly, and without authority or jurisdiction in the premises [state concisely what has been done, and in such manner as to show that the person making the affidavit has been affected]. And whereas it is alleged by said that your proceed-

¹ People v. Burney, 29 Cal. 459.

² Allen v. Commissioners, 19 Wend. 342.

³ People etc. v. Board of Delegates etc., 14 Cal. 479.

⁴ Id.; People v. Mayor of New York, 2 Hill, 9; Haviland v. White, 7 How. Pr. 154; *contra*, Carter v. Newbold, Id. 166.

⁵ Whitney v. Board of Delegates, 14 Cal. 500.

⁶ Lowe v. Alexander, 15 Cal. 300.

⁷ El Dorado Co. v. Elstner, 18 Cal. 144.

⁸ People etc. v. Board of Delegates etc., 14 Cal. 479.

⁹ People v. Berne, 44 Barb. 467.

¹⁰ Starkweather v. Seeley, 45 Barb. 164.

¹¹ Colden v. Borts, 12 Wend. 234.

ings therein have been irregular, without authority, and in violation of [naming the statute and the particular section alleged to be violated, and in what the violation consists; or if a violation of rules adopted by the board is relied upon, set out a copy of the rules].

And we being willing that your said proceedings in the premises, and appertaining thereto, should be certified and returned by you into our supreme court, before our justices thereof, at a term of said court to be held at, in, on the day of next, do command you that you certify and return into our supreme court, before our said justices thereof, at a term of said court to be held at the place and on the day last aforesaid, at the opening of the court on that day, all the proceedings concerning the said [removal from office, or other act complained of], and taken by and remaining before you, so that our said court may further act thereon, as of right and according to law ought to be done; and have you then and there this writ.

Witness,, chief justice of our said supreme court, at
this day of, 18..

By the court.

., Clerk.¹

§ 5370. Writ of Certiorari to Review Acts of Superior Court.

Form No. 1202.

[TITLE.]

The people of the state of California to the superior court of the county of

Whereas it manifestly appears to us by the affidavit of, the party beneficially interested, that in a certain action pending before you, against, at the suit of, you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being therefore willing to be certified of the said action or proceeding:

We therefore command you, that you certify and send to our supreme court, at the court-room thereof, in the city of, on the day of, A. D. 18.., annexed to the writ, a transcript of the record and proceedings in the action aforesaid,

¹ The writ should be addressed to his complaint: *Ex parte Mayor etc.*, the board, and not to the members 23 Wend. 277. A copy of the order individually: *People v. Chalwell*, 6 Abb. Pr. 151. It should show that allowing the writ should be served with it, or the allowance should be some person is aggrieved and recite indorsed on the writ: 19 Id. 640.

with all things touching the same, as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our supreme court, and that our supreme court may further cause to be done thereupon what it may appear of right ought to be done; and in the mean time we command and require the said superior court of the county of to desist from further proceedings in the matter so to be reviewed, and that execution be stayed in said cause.

Witness,, chief justice of our supreme court, at, this . . . day of, A. D. 18.. By the court.

[SEAL.]

., Clerk.

§ 5371. **Affidavit.**—The application for the writ must be made on affidavit by the party beneficially interested.¹ When the application is made to the supreme court the affidavit should show a sufficient reason why it is not made to the district court.² To justify the issuing of a writ of *certiorari* from the district court, to review proceedings in an action which has passed to judgment in a county court, on the ground that the latter court had no jurisdiction by reason of the excess of the amount in controversy, the affidavits by the applicant must state the amount of the judgment rendered. The question of jurisdiction depends upon the amount of the judgment, and not the amount prayed for in the complaint.³ Opposing affidavits may be received.⁴ The affidavit must state that the application is made in good faith, and not for the purpose of delay.⁵

§ 5372. **Discretion.**—The granting or refusal of the writ is within the sound discretion of the court, and where invoked for the purpose of reviewing the acts and decision of special jurisdictions which are created by the statute, and do not proceed according to the course of the common law, does not issue *ex debito justitia*, having due regard to public convenience, and the detriment which might result from interfering with their proceedings.⁶

§ 5373. **Issuance of Writ.**—Several writs of *certiorari* may be issued in one case.⁷

¹ Cal. Code C. P., sec. 1069.

² Gallardo v. Hannah, 49 Cal. 136.

³ Wratten v. Wilson, 22 Cal. 465.

⁴ People ex rel. Onderdonk v. Supervisors, 1 Hill, 195; People v. First Judge of Columbia, 2 Id. 398; Saratoga & Wash. R. R. Co. v. McCoy, 5 How. Pr. 375.

⁵ Cunningham v. La Crosse Packet Co., 10 Minn. 299.

⁶ Keys v. Marin Co., 42 Cal. 255; see also Hagar v. Sup. Ct. of Yolo Co., 47 Id. 228; Rutland v. Commissioners of Worcester, 20 Pick. 79; People ex rel. Church v. Supervisors etc., 15 Wend. 206; Susquehanna Bank v. Supervisors, 25 N. Y. 312; People v. Supervisors, 43 Barb. 232; Matter of Eightieth Street, 17 Abb. Pr. 324.

⁷ Matter of Woodbine Street, 17 Abb. Pr. 112.

§ 5374. **Notice.**—There is no provision of the statute requiring notice on the adverse party, on application for a procurement of a writ of *certiorari* to bring up the record and proceedings in the action. It is obvious, however, that he should be duly notified of the proceedings.¹

§ 5375. **Particular Cases.**—Where officers make a void order which is *coram non judice*, it is properly to be canceled by *certiorari*.² If the decision of commissioners in highway cases is appealed from, *certiorari* lies to remove the proceedings into the supreme court.³ But it does not lie to review acts of commissioners in laying out a road.⁴ The order granting a *habeas corpus* may be reviewed on *certiorari*.⁵ In cases of municipal assessments for improvements, *certiorari* will lie.⁶ But not at the instance of an individual, for the laying of a tax or assessment which affects a considerable number of persons.⁷

§ 5376. **Petition for Writ.**—A petition for *certiorari* must state the amount of the judgment, what it was for, that it was rendered, and against whom.⁸ A petition for *certiorari* will be dismissed which does not allege that the facts therein stated were proved, or does not give any reason why they were not proved.⁹ Heirs may petition for a *certiorari*, to revise the order of a county court, under which the homestead of the deceased was not legally disposed of.¹⁰ When the petitioner for a *certiorari* was detained at home by violent sickness during the trial of his cause, and after judgment his counsel obtained an

¹ Pollock v. Cummings, 38 Cal. 685; Cal. Code C. P., sec. 1069.

² Starr v. Trustees etc., 6 Wend. 563; People v. Judges, 24 Id. 249; Wildy v. Washburn, 16 Johns. 49; Fitch v. Commissioners, 22 Wend. 132.

³ Lawton v. Commissioners, 2 Cal. 179; Commissioners of Kinderhook v. Claw, 15 Johns. 537; Pearsall v. Commissioners, 17 Wend. 15; Pugsley v. Anderson, 3 Id. 468.

⁴ People ex rel. Woodward v. Covert, 1 Hill, 674. In what cases it lies in highway cases, see Baldwin v. City of Buffalo, 25 N. Y. 375.

⁵ People v. Mayer, 16 Barb. 362; Spencer v. Hilton, 10 Wend. 608.

⁶ Le Roy v. Mayor of N. Y., 20 Johns. 430; Starr v. Trustees of Rochester, 6 Wend. 564; People v. City of Rochester, 21 Barb. 656; Elmendorf v. Mayor of N. Y., 25 Wend. 593; Betts v. City of Williamsburgh, 15 Barb. 255.

⁷ In re Mount Morris Square, 2

Hill, 16; Case of Fifty-first Street, 3 Abb. Pr. 232. In case of a special statute, see Starr v. Trustees etc., 6 Wend. 564; Le Roy v. The Mayor etc., 20 Johns. 430; 8 Pick. 218; In re Mount Morris Square, 2 Hill, 14; People v. Mayor etc., 5 Barb. 43; Ex parte Van Orden, 13 Blatchf. 166; People v. Mayor of Brooklyn, 9 Barb. 535. In cases of ministerial officers, see Matter of Bruni, 1 Barb. 187. Of officer whose term has expired, to bring up his official proceedings for review, see Bac. Abr., Cert. F; Welsh v. Joy, 13 Pick. 477; The King v. Sheriff etc., 4 East, 604; People ex rel. Devlin v. Peabody, 6 Abb. Pr. 228. As to turnpike assessors: Broadhurst v. First Great Turnpike Co., 16 Johns. 8; or railroad appraisers: Hill v. Mohawk and Hudson R. R. Co., 7 N. Y. 152.

⁸ Boyd v. Clark, 21 Tex. 426.

⁹ Baldwin v. Hardin, 21 Tex. 443.

¹⁰ Norris v. Duncan, 21 Tex. 594.

appeal upon condition of his giving security for the appeal, which he failed to do by reason of his detention at home, it was held that these facts were sufficient to rebut the idea of his having abandoned the right to appeal, and entitled him to a *certiorari*.¹

§ 5377. **Principles of Determination.**—The necessary evidence to make out a fact essential to the jurisdiction of the officer will be assumed.²

§ 5378. **Proceedings.**—A defendant in a criminal case can not take out a writ of *certiorari*, except by special allowance of the supreme court or a judge thereof, or by consent of the attorney general, but such writ may be sued out by the district attorney in behalf of the commonwealth without such allowance or consent.³ A person not a party to summary proceedings can not sue out a *certiorari*.⁴ The proceedings of the tax-payer in the district court, contemplated by this statute, is a proceeding by *certiorari*, in the form and according to the course of that kind of suit, and the issuance of that writ is necessary to stay proceedings beyond the ten days, though probably no formal order of injunction is necessary.⁵ A stay of proceedings may be required by the writ, or omitted in the sound discretion of the court; but unless a stay is enjoined by the writ, the power of the inferior court or officer is not suspended, or the proceedings stayed.⁶

§ 5379. **Return of Writ.**—When the writ is directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.⁷ On petition for a *certiorari*, court must wait for a return in form from the court below.⁸ In order to procure a reversal, it is necessary that the order should be brought up and made a part of the record.⁹ A common-law *certiorari* brings up so much of the evidence as is necessary to present the questions of law upon which the relator relies to avoid the determination of the inferior court.¹⁰ When a case is

¹ Sharpe v. McElwee, 8 Jones L. 115.

² People v. Soper, 7 N. Y. 428. As to testimony, see Overseers of Plattekill v. Overseers of New Paltz, 15 Johns. 305. As to error in summoning jurors: Farrington v. Morgan, 20 Wend. 207. In proceedings in highways: People etc. v. Ferris, 36 N. Y. 218. As to assessors in making their return to a *certiorari* sued out to renew a tax: State Line R. R. Co. v. Fredericks, 48 Barb. 173.

³ Commonwealth v. Capp, 48 Pa. St. 53.

⁴ Starkweather v. Seeley, 45 Barb. 164.

⁵ California Northern R. R. Co. v. Butte Co., 18 Cal. 671.

⁶ See Cal. Code C. P., secs. 1071, 1072.

⁷ Cal. Code C. P., sec. 1070.

⁸ Ex parte Dugan, 2 Wall. 134.

⁹ People v. Highway Commissioners, 30 N. Y. 72.

¹⁰ Baldwin v. City of Buffalo, 35 N. Y. 375.

brought from an inferior court or tribunal to the supreme court by *certiorari*, if all the facts upon which the court below acted are not in the record, the supreme court may require the court below to certify such facts.¹ The return is made by annexing to the writ a full transcript of the record and proceedings in the case properly certified.² If the return of the writ be defective, the court may order a further return to be made.³ The writ may be made returnable, and a hearing be had thereon at any time.⁴ The return of a finding of facts made by a county judge to a writ of *certiorari* constitutes a part of the record, though the finding is not made until the next term after the testimony is taken, and the order or judgment based on it is made.⁵ A jury are no longer a legal body after their verdict is signed and they have reported; hence a return to a writ of *certiorari* signed by one of them afterwards is no return of the jury as a body or a tribunal.⁶

§ 5380. **What Questions may be Raised.**—The office of a writ of *certiorari* when issued out of the supreme court, to review the proceedings and determinations of the inferior tribunals, extends unquestionably to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings—that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by well-settled principles of the common law.⁷ It may determine whether there is any evidence, but not upon

¹ Blair v. Hamilton, 32 Cal. 49.

² Cal. Code C. P., sec. 1071.

³ Id., sec. 1075.

⁴ Id., sec. 1108.

⁵ Blair v. Hamilton, 32 Cal. 49; see C. P. R. R. Co. v. Bd. of Equalization, Id. 582.

⁶ People v. Highway Commissioners, 30 N. Y. 72. For sufficiency of return in a case of garnishment, see Gould v. Myer, 36 Ala. 565. In summary proceedings: Benjamin v. Benjamin, 5 N. Y. 383. By officer after term expired: Welch v. Joy, 13 Pick. 477; The King v. The Sheriff etc., 4 East, 604; Classon v. Shotwell, 12 Johns. 31; Seymour v. Webster, 1 Cow. 168; Harris v. Whitney, 6 How. Pr. 175.

⁷ Lynde v. Noble, 20 Johns. 80; Starr v. Trustees etc., 6 Wend. 566; Tallen v. Bigelow, 10 Id. 421; Rath-

bun v. Sawyer, 15 Id. 452; Nicholls v. Williams, 8 Cow. 13, 16; People v. Vermilyea, 7 Id. 108, 136, 137; Bird-sall v. Phillips, 17 Wend. 464; Simpson v. Rhinelanders, 20 Id. 103; People v. Mayor etc., 2 Hill, 9, 11, 398; In re Mayor etc., 6 Cow. 570; Bonton v. President etc., 2 Wend. 395; Comstock v. Porter, 5 Id. 98; People v. Van Alstyne, 32 Barb. 131; People v. Supervisors etc., 43 Id. 232; Hill v. The Mohawk etc. R. R. Co., 3 Seld. 152; Chegary v. The Mayor etc., 3 Kern. 223; S. C., 23 N. Y. 192, 222; S. C., 26 Id. 163; People ex rel. Citizens' Gaslight Co. v. Board of Assessors etc., 39 Id. 81; People ex rel. Buffalo & State Line R. R. Co. v. Fredericks, 48 Barb. 173; see also People etc. v. Board of Police, 39 N. Y. 506.

the weight and just force of evidence;¹ or whether the fact of jurisdiction is established.² They have a right to inquire into the principles upon which judges assessed damages in case of an assessment.³

CHAPTER II.

HABEAS CORPUS.

§ 5381. **In General.**—The writ of *habeas corpus* is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained.⁴ The writ of *habeas corpus*, when issued to inquire into the cause of an imprisonment, is in the nature of a writ of error, and when allowed and heard by an officer of the court, the officer is deemed a court, within the meaning of the act which forbids certain persons to be discharged before the expiration of the sentence, except upon a review by a court of superior jurisdiction to the magistrate making the commitment.⁵

§ 5382. **The Right of Personal Liberty.**—Personal liberty is defined to be the power of unrestrained locomotion.⁶ It is the right to do all things which a person wants to do, when the doing of those things will not violate any principle of common justice. It is the right to pursue happiness in any way man may choose, so that he does not give others misery. It is the unrestrained power to do right, with all reasonable restraints against doing wrong. Personal liberty does not mean license to commit crimes, or to go forth and be the judge in one's own case, and impose the penalty and inflict the punishment of real or fancied wrongs, without restraint. In ordinary terms, it means that we, as members of society, owing duties to it and receiving benefits from it, will do unto others as we would they

¹ *People v. Overseers of Ontario*, 15 Barb. 286.

² *People etc. v. Goodwin*, 5 N. Y. 568.

³ *Stone v. Mayor of N. Y.*, 25 Wend. 157; *Baldwin v. Calkins*, 10 Id. 166; but see *Matter of Mount Morris Square*, 2 Hill, 14. See further, on assessments, *Bonton v. President of Brooklyn*, 2 Wend. 395; *Ex parte Mayor of Albany*, 23 Id. 277; *Owners of Ground v. Mayor of Albany*, 15 Id. 374; *People v. City of Rochester*, 21 Barb. 666. As to taxation, see *Rex v. Inhabitants etc.* 2 Stra. 932; *Lawton v. Commissioners etc.*, 2 Cai. 182;

Church v. Supervisors, 15 Wend. 198. In summary proceedings, *Niblo v. Post*, 25 Wend. 280; following *Anderson v. Prindle*, 23 Id. 616; *Buck v. Binniger*, 3 Barb. 391.

⁴ *Hurd on Habeas Corpus*, 143.

⁵ 3 Bla. Com. 131, 132; *Alder v. Chip*, 2 Burr. 755, 756; *Ingersoll on Habeas Corpus*, 36; *In re Yates*, 4 Johns. 360; *Bac. Abr.*, tit. *Habeas Corpus*, A; *Ex parte Watkins*, 3 Pet. 203; *Case of the Twelve Commitments*, 19 Abb. Pr. 394; *Matter of Miller*, 1 Daly, 512.

⁶ *Hurd on Habeas Corpus*, 1.

would do unto us. Governments are formed for the purpose of securing and protecting men in the enjoyment of their natural rights, and they would fail of accomplishing that object if the powers to regulate or prescribe the mode in which such rights are to be exercised be not lodged in the law-making department.¹ Hence this provision of the constitution is not to be understood as putting life or liberty entirely beyond the reach of the government, if, for misconduct, the general welfare of the community demands its sacrifice or restraint; or as allowing every one to acquire property after his own unregulated manner, and according to his own uncontrolled will, but in such a manner and by such means as the general welfare of the community may require him to observe. While the exercise of these rights can not be denied to any one, it may be regulated.²

As the legislature is not prohibited from all interference with the rights enumerated in the constitution, such reasonable restraints as tend to keep man's passions in due bounds are not infringements upon his right of personal liberty. If it were so, then personal liberty would mean barbarism. These restraints are prescribed by the supreme power in the state, and a cheerful obedience to them is one of the chief evidences of an enlarged security for life, liberty, and property. Every act which may tend to impair the exercise of the natural right of persons, beyond what is needful for the general good, may be prohibited. But the instances are many, even in the history of our own country, when a citizen has been restrained of his personal liberty without due process of law, and this too when he has committed no wrong, or if he has, when he is being punished in an illegal manner. Hence the wisdom of our ancestors provided a means by which a person so restrained of his liberty contrary to law might in a speedy manner be freed. This means is the writ of *habeas corpus*, the privilege of which writ shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.³

§ 5383. **Right of Bail.**—In nearly every state in the Union all offenses are bailable, except only such felonies as are punished by death, and in those cases “the proof must be evident, or the presumption great,” to deprive the party of the right of bail.⁴ In some states the right to bail, where the proof is not thus evident, in capital cases, is not guaranteed by the constitu-

¹ Ex parte Smith, 38 Cal. 702.

² Id. 705.

³ Const. of U. S., art. 1, sec. 9,

subd. 2; Const. of Cal., art. 1, sec. 5.

⁴ Hurd on Habeas Corpus, 434.

tions thereof, but even then the right is as fully secured by the decisions of their courts.¹ The varied and sometimes difficult questions presented to the courts, when application for bail is made by a party charged with the commission of a felony, become matters of judicial discretion. No two cases are alike, and the judge necessarily stands between the liberty of the petitioner and the offended law. In capital cases, the fact as to whether the proof is evident or the presumption great may often cause a judge to doubt between two opinions. The discretion above referred to means a conscientious, a legal discretion. Under the benign influence of a modern civilization, the punishment imposed for the commission of the most heinous crimes is inflicted not so much to cause the subject pain as to avoid its repetition, to warn others against the committing of a like offense. Hence vindictive punishments and long imprisonments, except in rare and extreme cases, are unknown in American jurisprudence.

§ 5384. Petition for Writ.

Form No. 1203.

In the Matter of the Application }
 of }
 for a Writ of Habeas Corpus. }

To the Hon., judge of the superior court of the
 state of, in and for the county of

The petition of respectfully shows:

That is unlawfully imprisoned, detained, confined, and restrained of his liberty by, at, in the county of, in the state of

That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to wit [state what].

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said, commanding him to have the body of before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of detention, and said writ; and that he may be restored to his liberty.

Dated on the day of, 18..

[ORDINARY VERIFICATION.]

[SIGNATURE.]

§ 5385. **Application.**—Application for a writ of *habeas corpus* is made by petition, and must specify: 1. That the person

¹ See *Ex parte Taylor*, 5 Cow. 39; *ett*, 1 Hill, 398, note; *Hurd on Habeas Jones v. Kelly*, 17 Mass. 116; *Evans Corpus*, 437. *v. Foster*, 1 N. H. 374; *State v. Ever-*

in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them if they are not known; 2. If the imprisonment is alleged to be illegal, the petition must state in what the illegality consists; 3. The petition must be verified by the oath or affirmation of the party making the application. It must also be signed either by the party for whose relief it is intended, or by some person in his behalf.¹

§ 5386. **By Whom Granted.**—The writ may be granted by the supreme court, or any justice thereof, upon petition upon behalf of any person restrained of his liberty in this state. When so issued, it may be made returnable before the court, or any justice thereof, or before any district or county court, or any judge thereof. It may be granted by a district court or judge on behalf of any person restrained of his liberty within the judicial district, or by a county court or judge within his county.² The supreme court is always open for issuing this writ.³ Superior judges may at chambers grant the writ, or hear and dispose of it.⁴ Where a writ of *habeas corpus* issued by the supreme court is made returnable before a judge of a district court, his authority is the same as that of the supreme court would have been if the writ had been made returnable before it, and therefore his order was not in excess of his authority.⁵

§ 5387. **Fees.**—No fee or compensation of any kind must be charged or received by any officer for duties performed or services rendered in proceedings upon *habeas corpus*.⁶

§ 5388. **To Whom Directed.**—The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court or judge before whom the writ is returnable, at a time and place therein specified.⁷ If the person to whom the writ is directed refuses to obey the same, the court or judge must, upon affidavit, issue an attachment for his apprehension, and he may be committed to jail until he makes due return to the writ or is otherwise discharged.⁸

§ 5389. **Return.**—The person on whom the writ is served is required to produce the body of the person under his custody or

¹ Cal. Penal Code, sec. 1474.

² Id., sec. 1475.

³ Cal. Code C. P., sec. 48.

⁴ Id., sec. 176.

⁵ People v. Booker, 51 Cal. 318; consult Ex parte Marks, 49 Id. 680.

⁶ Cal. Pol. Code, sec. 4333.

⁷ Cal. Penal Code, sec. 1477. As to delivery to the officer for service, see Id., sec. 1478.

⁸ Id., sec. 1479.

restraint, according to the command of the writ, unless prevented by the sickness or infirmity of the person to be produced, which fact must be shown by affidavit, in which case the cause may proceed in his absence, or the hearing be adjourned until he can be produced.¹

§ 5390. **Repeated Applications.**—The doctrine of *res adjudicata* does not apply to proceedings on *habeas corpus*, and the refusal to grant the writ is no bar to a second application.²

§ 5391. **Order Granting Writ.**

Form No. 1204.

[TITLE.]

On reading and filing the petition of, duly signed and verified by him, whereby it appears that he is illegally imprisoned and restrained of his liberty by, at the, in the county of, in the state of, and stating wherein the illegality consists, from which it appears to me that a writ of *habeas corpus* ought to issue:

It is ordered that a writ of *habeas corpus* issue out of and under the seal of the superior court of the state of, in and for the county of, directed to the said, commanding him to have the body of the said before me, in the court-room of the said court, on the day of, 18.., at o'clock A. M. of that day, to do and receive what shall then and there be considered concerning the said, together with the time and cause of his detention, and that he have then and there the said writ.

Dated on the day of, 18..

P. Q.,

Judge.

§ 5392. **Proceedings and Practice—Bail.**—When any person is imprisoned or detained in custody on any criminal charge for want of bail, he is entitled to a writ of *habeas corpus*, for the purpose of giving bail, upon averring that fact in his petition, without alleging that he was illegally confined.³ On the hearing the judge may, if the offense is bailable, take an undertaking, as in other cases, and file the same in the proper court.⁴ Admission to bail is the order of a competent court or magis-

¹ Cal. Penal Code, sec. 1481, 1482. The requisites of a return are found in the penal code, sec. 1480.

² In re Edward Ring, 28 Cal. 247; In re Perkins, 2 Id. 424. See, under common-law rule, Ex parte Partington, 13 Mee. & W. 679; In re Parker, 5 Id. 32; The King v. Suddis, 1 East,

306, 314; Burdett v. Abbot, 14 Id. 91; Watson's Case, 9 Ad. & El. 731; Ex parte Kaine, 3 Blatchf. 1; compare In re Kaine, 14 How. U. S. 103; Ex parte Robinson, 6 McLean, 355.

³ Cal. Penal Code, sec. 1490.

⁴ Id., sec. 1491.

trate, that the defendant be discharged from actual custody upon bail.¹

§ 5393. **Custody.**—A person convicted of a crime against the United States by a federal court, and confined in the prison of the state, with the consent of the state, is in the custody of the federal authorities.²

§ 5394. **Defects of Form.**—No writ of *habeas corpus* can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought.³

§ 5395. **Discharge.**—When a party is “in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same,” he will be discharged on *habeas corpus*.⁴ So when the indictment charges an offense not known to the law.⁵ So where five females are brought before the court on a return to a writ of *habeas corpus*, and the person in whose custody they are neither shows nor claims any legal right to detain them, they will be discharged.⁶ A prisoner committed on final process will not be discharged on *habeas corpus* by reason of defects in the judgment, unless the judgment is absolutely void.⁷ If the warrant of commitment be informal or insufficient, the court, upon *habeas corpus*, will discharge the prisoner; but if sufficient cause appear, will recommit him in proper form.⁸ Where the prisoner is not discharged on a writ of *habeas corpus*, it is the duty of the court to remand him.⁹

§ 5396. **Hearing on Habeas Corpus.**—The hearing should be had immediately upon the return of the writ;¹⁰ but may be adjourned under certain circumstances.¹¹ The party brought before the court or judge, on the return of the writ, may deny

¹ Cal. Penal Code, sec. 1268. If the offense charged is punishable with death, see *Id.*, sec. 1271. Pending an appeal, in other cases, after conviction, see *Id.*, secs. 1272, 1273, 1274; *Ex parte Voll*, 41 Cal. 29. When the defendant has been held to answer after examination, see Cal. Penal Code, sec. 1277. Form of undertaking: *Id.*, sec. 1278. Qualification of bail: *Id.*, secs. 1279 to 1281. Upon indictment before conviction, see *Id.*, secs. 1284 to 1287; *Ex parte McLaughlin*, 41 Cal. 212. Deposit instead of bail: Cal. Penal Code, sec. 1295. General principles touching discharge of person charged with a criminal offense: *Id.*, sec. 1489.

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² *Ex parte Le Bur*, 49 Cal. 159.

³ Cal. Penal Code, sec. 1495.

⁴ *Ex parte Jenkins*, 2 Wall. jun. C. C. 521; 2 Am. Law Reg. 144.

⁵ *In re Corryell*, 22 Cal. 178.

⁶ *Ex parte Queen of the Bay*, 1 Cal. 157.

⁷ *People v. Smith*, 1 Cal. 9.

⁸ *Ex parte Bennet*, 2 Cranch C. C. 612; see also *Ex parte Branigan*, 19 Cal. 133; *Ex parte Milburn*, 9 Pet. 704.

⁹ *People ex rel. Crouse v. Cowles*, 4 Keyes, 38.

¹⁰ Cal. Penal Code, sec. 1483.

¹¹ *Id.*, sec. 1482; see also *Ex parte Gibson*, 31 Cal. 623; *Ex parte Ring*, 28 *Id.* 247.

or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The proofs adduced on either side must be heard, and the attendance of witnesses may be compelled by subpoena and attachment.¹ An inquiry may be made outside the record, to ascertain whether in fact the confinement is on account of acts done in pursuance of a law of the United States, and under process from a judge of the same.² The functions of the writ, where the party appealing to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face.³ The court may proceed to inquire whether the indictment charges any offense known to the law.⁴ But it is not competent to retry the issues of fact, or to review the proceedings of a legal trial.⁵ Under the writ of *habeas corpus* it is not competent to determine whether or not the order of the court upon which the process was founded is or is not erroneous.⁶ The remedy in such case is by *certiorari*.⁷ The court has only to inquire whether a warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offense.⁸ *Habeas corpus* is the proper remedy for every unlawful imprisonment, both in civil and criminal cases; but an imprisonment is not unlawful, in the sense of this rule, merely because the process or order under which the party is held has been irregularly issued, or is erroneous.⁹

§ 5397. Jurisdiction—State Courts.—The writ of *habeas corpus* may be issued and heard by the supreme court or any justice thereof, by a superior court or any judge thereof.¹⁰ It may be issued in term or vacation, and be heard before the court or a judge at chambers.¹¹ So in case of a party arrested as a fugitive from justice.¹² But they have no power to control the executive discretion in such cases. Yet that discretion may be inquired into in every case involving the liberty of the citizen.¹³ Its allowance in term-time by the supreme court of Cali-

¹ See Cal. Penal Code, sec. 1484.

² *Ex parte Jenkins*, 1 Phil. 168; S. C., 2 Wall. jun. C. C. 521; 2 Am. Law Reg. 144.

³ *Ex parte McCullough*, 35 Cal. 97.

⁴ *In re Corryell*, 22 Cal. 178.

⁵ *Ex parte Bird*, 19 Cal. 130.

⁶ *Ex parte McCullough*, 35 Cal. 97; *Ex parte Granice*, 51 Id. 375.

⁷ *Matter of Place*, 34 How. Pr. 259.

⁸ *United States v. Johns*, 4 Dall. 412.

⁹ *Ex parte McCullough*, 35 Cal. 97.

¹⁰ See Cal. Penal Code, sec. 1475.

¹¹ See Id., sec. 1483, and Cal. Code C. P., secs. 48, 76, 166.

¹² *In the Matter of Manchester*, 5 Cal. 237.

¹³ Id.

foria is in the discretion of the court.¹ The supreme court may exercise its appellate jurisdiction by means of this writ.² But by the amendment to the constitution, it has original jurisdiction in the issuance of the writ.³

§ 5398. **Jurisdiction, Conflict of.**—Where a person is properly in custody under state authority, the United States circuit court has no authority to take the accused by *habeas corpus* from such authority;⁴ nor has a state court authority to remove a defendant from the custody of a court of the United States.⁵ So in extradition cases where a warrant has been issued by the secretary of state, and is in the hands of the United States marshal;⁶ so also in cases of enlistment.⁷ It can not inquire into the validity of an enlistment in the case of desertion;⁸ or where the prisoner is awaiting a trial before a court-martial.⁹

§ 5399. **Practice.**—The proceedings on a writ of *habeas corpus* in the federal courts are governed by the common law of England as it stood at the adoption of the constitution, subject to such alterations as congress shall see fit to prescribe, and not by the state statutes.¹⁰ So in cases of aliens.¹¹ A petitioner for a writ of *habeas corpus* is not entitled to a jury to try issues of fact.¹² Upon a return of *habeas corpus* in a case of arrest upon suspicion and without a warrant, proof must be given to show the suspicion to be well founded.¹³

§ 5400. **Rearrest.**—No person who has been discharged by order of the court or judge upon *habeas corpus* can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases: 1. If he has been discharged from cus-

¹ *Ex parte Ellis*, 11 Cal. 222.

² *People v. Turner*, 1 Cal. 143.

³ *Tyler v. Houghton*, 25 Cal. 26. As to the jurisdiction of state courts in the issuance of this writ, consult "Jurisdiction," *ante*, sec. 27-50.

⁴ *United States v. Rector*, 5 McLean, 174; see also *Ableman v. Booth*, 21 How. U. S. 506; *Ex parte Dorr*, 3 Id. 103.

⁵ *United States v. Rector*, 5 McLean, 174; see also Cal. Penal Code, sec. 1486; *Ex parte Le Bur*, 49 Cal. 159.

⁶ In the *Matter of Veremaitre*, 9 N. Y. Leg. Obs. 137; 6 Opp. Att'y Gen. 103, 713. See, as to the power of United States courts in such cases, *Ex parte Smith*, 3 McLean, 121; In re *Kaine*, 10 N. Y. Leg. Obs. 257; S. C., 14 How. U. S. 108; *Robb v. Connolly*, 111 U. S. 624, overruling *Ex parte Robb*, 1 West Coast Rep. 439.

⁷ *Matter of O'Connor*, 48 Barb. 258; S. C., 3 Abb. Pr., N. S., 137; *Reilly's Case*, 2 Id. 334; *People v. Gaul*, 44 Barb. 98; *Matter of Martin*, 45 Id. 142. As to issuance of writ in cases of enlisted soldiers, and of the authority of state courts in the issuance of the writ of *habeas corpus* in such cases, consult *Matter of Barrett*, 42 Id. 479; *Matter of Graham*, 8 Jones L. 416; *Matter of Bryan*, 1 Wins. (N. C.) No. 1; *Matter of Rosenan*, Id. 443.

⁸ See above cases; and see *Ex parte Anderson*, 16 Iowa, 595.

⁹ *Matter of Beswick*, 25 How. Pr. 159.

¹⁰ *Ex parte Watkins*, 3 Pet. 193; *Ex parte Kaine*, 3 Blatchf. 1.

¹¹ *Matter of Barry*, 7 Law Rep. 374.

¹² *Baker v. Gordon*, 23 Ind. 204.

¹³ 2 Inst. 52; In re *Henry*, 29 How. Pr. 183.

tody on a criminal charge, and is afterwards committed for the same offense by legal order or process; 2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested, on sufficient proof, and committed by legal process for the same offense.¹

§ 5401. **Refusal to Grant, etc.**—If any judge, after a proper application is made, refuses to grant an order for a writ of *habeas corpus*, or if the officer or person to whom such writ may be directed refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any court of competent jurisdiction.²

§ 5402. **Remanded.**—The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody: 1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.³ Where a commitment under a charge for murder was insufficient, because it failed to state the name of the person alleged to have been murdered, or that the name of such person was unknown, it was held that these defects did not entitle the petitioner to be discharged.⁴

§ 5403. **Return of Writ.**—Upon a return to a writ of *habeas corpus*, it is proper for the court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner.⁵ A return "that the person alleged to be detained was not within the control and custody of the party to whom the writ was directed, and that such person was beyond the jurisdiction of the court, was held evasive and insufficient where such person had been removed in anticipation of the issuance of the writ."⁶ Attachment for not returning is not issued until three days after service of the writ.⁷

¹ Cal. Penal Code, sec. 1496.

² Id., sec. 1505.

³ Id., sec. 1486.

⁴ Ex parte Bull, 42 Cal. 199; see also People v. Smith, 1 Id. 9; Ex parte Bird, 19 Id. 131; Ex parte Gibson, 31 Id. 623; Ex parte Ring, 28 Id. 247; Ex parte Murray, 43 Id. 455;

see also Cal. Penal Code, secs. 1492-1494.

⁵ People v. Smith, 1 Cal. 9.

⁶ United States v. Davis, 5 Cranch C. C. 622.

⁷ United States v. Bollman, 1 Cranch C. C. 373.

In Nevada, the warden of the state prison may show that he holds the prisoner not only by virtue of a commitment, but also under sentence of the court.¹

§ 5404. **Warrant.**—Where it appears that any one is illegally held in custody, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of *habeas corpus* directed to the sheriff, coroner, or constable of the county, can be enforced, a warrant may be issued reciting the facts, and commanding him to take the person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law.²

§ 5405. **Writ—Form of.**—The writ must be issued by the clerk, and bear the seal of the court.³ It must be returned before the judge (when issued by a judge) at the county seat, and there be heard and determined.⁴ It may be issued and served on any day, at any time.⁵

§ 5406. **Who may Issue Writ.**—The courts of the United States are empowered to issue the writ of *habeas corpus*.⁶ Either of the justices of the supreme court of the United States, as well as a judge of any United States district or circuit court, may issue the writ.⁷ In cases removed from state courts against a person denied civil rights, and such person is in actual custody under process issued by the state court, a writ of *habeas corpus cum causa* must be issued by the clerk and delivered to the marshal.⁸

§ 5407. Writ of Habeas Corpus.

Form No. 1205.

[TITLE.]

[VENUE.]

The people of the state of California, to A. B., greeting: *

We command you, that you have the body of C. D., by you

¹ Ex parte Salge, 1 Nev. 449.

² Cal. Penal Code, sec. 1497.

³ Id., sec. 1503.

⁴ Id., sec. 1504.

⁵ Id., sec. 1502.

⁶ U. S., sec. 751.

⁷ Id., sec. 752.

⁸ Id., sec. 642. In cases against revenue officers, and officers acting under registration laws, see Id., sec. 643. For proceedings generally in *habeas corpus* cases in the United States courts, see Id., sec. 751 to 766. That territorial courts may grant, see Id., sec. 1912. For various questions

relating to this writ, consult Ex parte Smith, 3 McLean, 121; Matter of Keeler, Hempst. 300; Ex parte Des Rochers, 1 McAll. 68; United States v. Hamilton, 3 Dall. 17; Ex parte Burford, 3 Cranch, 448; Ex parte Bollman, 4 Id. 75; Ex parte Watkins, 7 Pet. 568; Ex parte Kearney, 7 Wheat. 38; Ex parte Milburn, 9 Pet. 704; Matter of Metzger, 5 How. U. S. 176. As to power of circuit courts, see Ex parte Milligan, 4 Wall. 3; Ex parte Smith, 3 McLean, 121. Of justice in vacation, see Matter of Kaine, 14 How. U. S. 103; Ex parte Barnes, Sprague, 133.

imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said C. D. shall be called or charged, before G. H., judge of the superior court of the state of California, in and for the county of, at the court-room of the said court, in and for the city and county of San Francisco, on the day of, 18.., at o'clock in the noon of that day, to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ.

Witness, Hon., judge of the said court, at the court-room thereof, in the city and county of San Francisco, this day of, 18..

Attest, my hand and the seal of the said court, the day and year last above written.

K. L., Clerk.

By O. P., Deputy Clerk.

§ 5408. **Issuance of Writ.**—The writ should not issue to run out of the county, unless for good cause shown, as the absence, refusal, or disability of the judge to act, or other reason, showing that the object and reason of the law requires its issuance.¹ In such case, resort may be had to officers out of the county.² Though the writ is a writ of right, it is not granted of course, but upon probable cause shown.³ The act of issuing the writ is purely ministerial, and in no sense judicial.⁴ A writ will not be granted if it appears from the application, *prima facie*, that there is not sufficient ground for the discharge of the party imprisoned.⁵

¹ *Ex parte Ellis*, 11 Cal. 222.

² *Id.*

³ *United States v. Lawrence*, 4 Cranch C. C. 518; *Matter of Keeler*, Hempst. 307; *Ex parte Vollandigham*, *Trial of Vollandigham*, 259; *Ex parte Davis*, 4 Law Rep., N. S., 301. As to when issuance will be refused, see *Ex parte Kaine*, 3 Pet. 193; *Sim's Case*, 7 Cush. 285; *Hurd on Habeas Corpus*, 223; *Ex parte Vollandigham*,

Trial of Vollandigham, 259. That the allowance or refusal is matter of law and not of discretion, see *Ex parte Milligan*, 4 Wall. 3.

⁴ *People v. Nash*, 5 Park. Cr. 473; *Nash v. People*, 36 N. Y. 607; *Matter of Nash*, 16 Abb. Pr. 281; but to the contrary is *People ex rel. Ryan v. Russell*, 1 Abb. Pr., N. S., 230.

⁵ *In re Grozier*, 16 Wis. 423.

CHAPTER III.

MANDAMUS.

§ 5409. **In General.**—The writ of *mandamus* may be denominated the writ of mandate.¹ It may be issued by any court except a justice's or police court, to an inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.² It is now regarded, not as a prerogative writ, but in the nature of an action by the person in whose favor the writ is granted, for the enforcement of a right in cases where the law affords him no other adequate means of redress.³ It is used merely to compel action, and coerce the performance of a pre-existing duty, where it was the plain duty of the respondent to act without its agency.⁴ Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of *mandamus* can not rightfully issue.⁵ The writ is frequently granted where it can only determine one step in the progress of inquiry, and when it can not finally settle or determine the controversy, as where canvassers of votes may be compelled to canvass the votes cast at an election, and return the result, though it may be necessary to resort to other proceedings to determine the ultimate questions of right, and to procure admission to the office.⁶ There must be an actual default or omission of duty before the writ can be granted, and this must be made to appear by the relator. An omission of duty can not be anticipated. Threats, or pre-determination not to discharge the duty, are not sufficient, if the time for performing the duty has not expired.⁷ A demand and refusal are not necessary, however, where the duties are of a public nature, and affect the public at large, but where an individual claims the immediate and personal benefit of the act or duty, a demand and refusal are held necessary.⁸

¹ Cal. Code C. P., sec. 1084.² Id., sec. 1085.³ *Arbury v. Beavers*, 6 Tex. 457.⁴ *People v. Gilmer*, 5 Gilm. 242; *People v. Hatch*, 33 Ill. 140.⁵ *State v. Supervisors*, 2 Chand. 250.⁶ *State v. County Judge of Marshall*, 7 Iowa, 186.⁷ *Commissioners etc. v. County Commissioners*, 20 Md. 449; *State v. Carney*, 3 Kan. 88.⁸ *Creville & V. R. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354.

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.¹ By the "ordinary course of law" is not meant a common-law remedy only, but it includes all special or particular remedies provided by statute.² So where another adequate remedy has been lost by neglect, or delay, the writ will not be granted.³ Though other remedies exist, if they are inadequate to afford the particular relief to which the party is entitled, the writ will issue.⁴ In one case the writ was sought to compel the sheriff to execute a writ of possession. The court said: "It is true, the relator might sue defendant on his bond for the damages resulting from the non-performance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process, and is the only adequate remedy."⁵ So it is said the existence of equitable remedies does not affect the jurisdiction of courts of law to grant the writ of *mandamus*, although their existence may control their discretion in the matter.⁶ It is well settled that the exercise of discretion can not be controlled or directed by *mandamus*. A judicial officer may be compelled to act, but the judgment or decision which he shall reach can not be controlled. It is only where the act to be done, or the duty to be performed, is of a peremptory character, as distinguished from those which are discretionary, that this remedy will be granted. It issues to the judges of inferior courts wherever justice has been improperly delayed.⁷ It may compel action, but can not be used to correct the errors of an inferior court;⁸ nor to restrain the performance of duties.⁹

§ 5410. **County Officers.**—Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of *mandamus* is the proper legal remedy;¹⁰ or to compel county commissioners to impanel a new jury to determine the location of a highway in a statutory case;¹¹ or to compel county board of supervisors to

¹ Cal. Code C. P., sec. 1086.

² State v. Supervisors etc., 29 Wis. 79.

³ Id.

⁴ See Fremont v. Crippen, 10 Cal. 215.

⁵ Id. See also Babcock v. Goodrich, 47 Cal. 488.

⁶ See People v. Mayor, 10 Wend. 395.

⁷ Ex parte Crane, 5 Pet. 190.

⁸ State ex rel. Treadway v. Wright, 4 Nev. 119.

⁹ Terry v. Stauffer, 17 La. Ann. 306.

¹⁰ Knox v. Aspinwall, 24 How. U. S. 376; Robinson v. Supervisors, 43 Cal. 353; see also People v. Supervisors, 50 Id. 563; Rose v. County Commissioners, 50 Me. 243.

¹¹ Mendon v. Worcester, 10 Pick. 236.

subscribe to capital stock of a corporation where they are directed so to do by the statute;¹ but not to compel county commissioners to remove the county seat.² It will be granted to compel an assessor to assess for taxation property liable to be taxed, and which he neglects or refuses to assess;³ or to compel assessors to correct an erroneous assessment;⁴ or to compel a tax collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same,⁵ on behalf of one illegally assessed.⁶ A *mandamus* will not lie against a county treasurer to compel him to pay interest due on county bonds.⁷ But it will lie to compel a county auditor to pay a county debt.⁸

§ 5411. **Governor of State.**—*Mandamus* will issue to the governor in certain cases.⁹ A writ of mandate will be issued to compel the governor to sign a patent, unless the law has vested him with discretionary power in that respect;¹⁰ so as to land embraced in a sixteenth and thirty-sixth sections, not surveyed by the United States.¹¹ When a ministerial duty affecting a private right is specially devolved on the governor by law, which legislature might have devolved on any other state officer, he may be compelled to perform the same by a writ of mandate.¹² A *mandamus* lies to compel the governor of Maryland to issue a commission to which the petitioner is entitled under the state constitution, that being a ministerial act.¹³ The supreme court has no authority to issue a *mandamus* to compel a governor of a state to return to another state a fugitive from justice.¹⁴

§ 5412. **Government.**—If all pre-emption laws should be repealed and never re-enacted, a party who has merely entered as a pre-emptor, without payment, would have no right which he could enforce against the government. He would have no action for damages, and could not compel the issuing of a patent by *mandamus*.¹⁵

¹ Napa Valley R. R. Co. v. Napa County, 30 Cal. 435.

² Condit v. Board of Commissioners, 25 Ind. 422.

³ People v. Shearer, 30 Cal. 645; Gorgas v. Blackburn, 14 Ohio, 252; but see Tillson v. Commissioners etc., 19 Id. 415.

⁴ People v. Olmstead, 45 Barb. 644.

⁵ Perry v. Washburn, 20 Cal. 318.

⁶ People v. Barton, 44 Barb. 148. As against commissioners of jurors, see People v. Taylor, 45 Barb. 129.

⁷ People v. Fogg, 11 Cal. 351.

⁸ State v. Auditor of Hamilton, 19 Ohio, 116; but see Burnett v. Auditor of Portage, 12 Id. 54.

⁹ McCauley v. Brooks, 16 Cal. 11.

¹⁰ Middleton v. Low, 30 Cal. 596.

¹¹ Id.

¹² Id.

¹³ Magruder v. Swann, 25 Md. 175; see Magruder v. Tuck, Id. 217.

¹⁴ Kentucky v. Dennison, 24 How U. S. 66.

¹⁵ Hutton v. Frisbie, 37 Cal. 475; see 8 Opinions of Att. Gen. 71; 10 Id. 57; 11 Id. 491; see also Bower v. Higbee, 9 Mo. 257.

§ 5413. **Jurisdiction.**—The power to issue the writ of *mandamus* is generally confided to the highest court of original jurisdiction.¹ It can not be issued by a court having only appellate powers.² A superior court will never prescribe how the discretion of an inferior tribunal shall be exercised; but will in proper cases require an inferior court to decide;³ or it may require an inferior court to proceed to judgment.⁴ In the exercise of its ordinary appellate jurisdiction, the supreme court can take cognizance of no case until a final judgment or decree shall have been made in the inferior court.⁵ The supreme court of California has original jurisdiction in cases of *mandamus* under the constitution as amended in 1879.⁶ The supreme court of California has no jurisdiction by its writ of mandate, when directed to a person who acts in his judicial or deliberative capacity, except to compel a performance of his official duty by acting and deciding in the premises to the best of his judgment.⁷ The constitution of California as amended confers upon the superior courts original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*,⁸ regardless of the amount involved.⁹ County courts have not jurisdiction to issue *mandamus*, nor can it be conferred on them by statute, as it is not a “special case” within the meaning of that term in the constitution, and such statute is therefore unconstitutional.¹⁰ A state court has no jurisdiction to issue a *mandamus* to an officer commissioned by the United States. His conduct can only be controlled by the power that created the office.¹¹

§ 5414. **Ministerial Offices.**—*Mandamus* may be resorted to to compel an officer to do an act which is sought to be enforced, in all cases where the officer has no discretion, and where he is under obligation to do the specific act.¹² A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser

¹ Kendall v. United States, 12 Pet. 524; affirming United States v. Kendall, 5 Cranch C. C. 163.

² Howell v. Crutchfield, Hempst. 99. For the extent of the power of the circuit court to issue writs of *mandamus*, see McIntire v. Wood, 7 Cranch, 504; Ex parte Hennen, 13 Pet. 225; Knox County v. Aspinwall, 24 How. U. S. 376; Smith v. Jackson, 1 Paine, 453.

³ Life and Fire Ins. Co. of N. Y. v. Wilson, 8 Pet. 291.

⁴ Life and Fire Ins. Co. of N. Y. v. Adams, 9 Pet. 573.

⁵ Id.

⁶ Tyler v. Houghton, 25 Cal. 20;

People v. Weston, 28 Id. 639, and authorities there cited.

⁷ Francisco v. Manhattan Ins. Co., 36 Cal. 283.

⁸ Perry v. Ames, 26 Cal. 381; affirmed in Courtwright v. B. R. & A. W. & M. Co., 30 Id. 583.

⁹ Cariaga v. Dryden, 30 Cal. 244.

¹⁰ People v. Supervisors of Kern Co., 45 Cal. 679; Wilcox v. Oakland, 49 Id. 31.

¹¹ McClung v. Silliman, 6 Wheat. 598.

¹² People ex rel. McDougall v. Bell, 4 Cal. 177; Flagley v. Hubbard, 22 Id. 36.

at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of his lien.¹ The supreme court will not issue a *mandamus* to the clerks of the superior courts in the first instance.² A *mandamus* will not lie against the clerk of the superior court, to compel him to issue execution on a money judgment rendered in the court of which he is clerk.³ *Mandamus* will lie to compel the clerk of the common council to make publication of certain notices which it is his duty to publish.⁴ So it will lie to compel a town clerk to deliver the town record to his successor.⁵ If an official duty is to be performed by an officer on the happening of a certain event, he can not capriciously refuse to perform it on the plea that he is not satisfied that it has happened. If the fact exists, and it is established by proof, it is his legal duty to be satisfied and perform the act, and *mandamus* will lie.⁶

§ 5415. **Municipal Corporations.**—Boards of supervisors and bodies like them, without any legislative provision, by general law are subject, with certain exceptions, to *mandamus* to enforce the performance of the duties devolved upon them.⁷ Where the board of supervisors act ministerially in the issuance of bonds under act of the legislature, *mandamus* lies if they improperly refuse.⁸ So as to the issue of stock.⁹ So where the board of supervisors of a county are empowered to subscribe for the county to the capital stock, and may be compelled to subscribe by writ of mandate.¹⁰ Where it is their duty to provide for the payment of judgments, they must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation;¹¹ and *mandamus* may compel such levy.¹² Where, however, they act in the exercise of their discretion, there is no authority to interfere with their determination;¹³ but when they act under mistake of law, the

¹ Williams v. Smith, 6 Cal. 91.

² Cowell v. Buckelew, 14 Cal. 640.

³ Goodwin v. Glazer, 10 Cal. 333.

⁴ Washington v. Page, 4 Cal. 388; but see People v. Board of Supervisors of San Francisco etc., 27 Id. 655.

⁵ Taylor v. Henry, 2 Pick. 397; Walter v. Belding, 24 Vt. 658.

⁶ Stockton R. R. Co. v. Stockton, 51 Cal. 328.

⁷ Hastings v. City and County of San Francisco, 18 Cal. 49; Alden v. Alameda Co., 43 Id. 270.

⁸ C. N. R. R. Co. v. Butte Co., 18 Cal. 671.

⁹ People v. Common Council of New York, 45 Barb. 473.

¹⁰ Napa Valley R. R. Co. v. Napa Co., 30 Cal. 435.

¹¹ People ex rel. Frank v. San Francisco, 21 Cal. 668.

¹² Hoffman v. City of Quincy, 4 Wall. 535; Supervisors v. United States, Id. 435; Coy v. Lyons City, 17 Iowa, 1; Robinson v. Supervisors, 43 Cal. 53.

¹³ Thomas v. Armstrong, 7 Cal. 287; Fall v. Paine, 23 Id. 302.

error may be corrected by *mandamus*, or any other proper proceeding.¹ *Mandamus* does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff.² A *mandamus* to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account, and issue warrants accordingly.³ *Mandamus* is the proper proceeding to try the question whether a board of supervisors have the power to approve a claim against a county;⁴ or to compel a board to audit and allow the claims of county officers, etc.⁵ But such writ does not control or prescribe the mode, or determine the result of their action.⁶

§ 5416. **Nature of Remedy.**—The object of the writ is not to supersede legal remedies, but to supply the want of them. The relator must therefore have a clear legal right to the performance of a particular act or duty at the hands of the respondent, and it must appear that the law affords no other adequate remedy to secure the enforcement of the right, and the performance of the duty it is sought to coerce.⁷ The writ of *mandamus* is the proper remedy to compel inferior tribunals to perform the duties required of them by law;⁸ to compel judges to hold their courts, and county officers to keep their offices at a county seat.⁹ A writ of *mandamus* is not the appropriate remedy for orders made in a cause by a judge, in the exercise of his authority, although they may bear harshly upon the party; nor to compel any person, inferior officer, court, or corporation to act in any particular manner, when such person, officer, court, or corporation is invested with discretionary power.¹⁰ That discretion can not be controlled by this writ, but if it refuses to exercise its discretion, a *mandamus* will lie to compel it to do so.¹¹

¹ Thomas v. Armstrong, 7 Cal. 287; Fall v. Paine, 23 Id. 302.

² People v. Supervisors of Santa Barbara County, 14 Cal. 102; see Magee v. Board of Supervisors of Calaveras Co., 10 Id. 376.

³ Tuolumne Co. v. Stanislaus Co., 6 Cal. 440. As to law concerning intelligence offices, see Hall v. Supervisors of San Francisco, 20 Id. 591.

⁴ People v. Supervisors, 28 Cal. 429.

⁵ People v. Supervisors of New York, 32 N. Y. 473.

⁶ People ex rel. Gas Co. v. Supervisors of San Francisco, 11 Cal. 42; Price v. Sacramento Co., 6 Id. 254.

⁷ Conro v. Port Henry Iron Co., 12 Barb. 27; People v. Thompson, 25 Id.

73; Tarver v. Commissioners etc., 17 Ala. 527; The King v. Northingham Old Water Works, 6 Ad. & El. 355.

⁸ Carpenter v. Bristol, 21 Pick. 258; Commonwealth v. Hamden, 2 Id. 414.

⁹ Calaveras County v. Brockway, 30 Cal. 325.

¹⁰ People etc. v. Bell, 4 Cal. 177; People ex rel. Flagley v. Hubbard, 22 Id. 34; People v. Weston, 28 Id. 640, and authorities there cited; People v. Pratt, Id. 166; Ex parte Whitney, 13 Pet. 404; Gaines v. Relf, 15 Id. 9.

¹¹ People v. Supervisors of Westchester, 12 Barb. 446; Commonwealth v. The Judges etc., 3 Binn. 273; Roberts v. Holsworth, 5 Halst. 57.

§ 5417. **Quo Warranto.**—*Mandamus* may issue to restore a person to office from which he has been illegally removed;¹ or to compel the admittance of one to an office from which he is unlawfully excluded.² If a county judge refuses to appoint commissioners to appraise land, in a proceeding to condemn the same, a writ of mandate will be issued compelling him to do so.³

§ 5418. **Religious Corporations.**—A *mandamus* may issue to compel a religious corporation to admit a minister to the pulpit;⁴ but not to restore a minister to his clerical rights and functions, where there are no fees or emoluments attached to his office.⁵ It may issue to compel the clerk or treasurer of a religious society to deliver the records to his successor.⁶

§ 5419. **State Officers.**—*Mandamus* will issue to compel the secretary of the state of Louisiana to affix his official signature.⁷ But it will not compel the secretary of state to certify a bill or an enrolled act to be a law which is not among the archives of his office.⁸ It may issue to compel a secretary of state to deliver a commission.⁹ Where it was the duty of the controller to have issued warrants upon the treasury for the sums claimed under a state prison contract, the performance of this can be enforced by *mandamus*.¹⁰ A *mandamus* may issue to compel the controller of state to account to a member of the legislature for the daily compensation fixed by law.¹¹ As no action can be maintained against the state, the court will not permit a claim to be enforced circuitously by *mandamus* against the treasurer.¹² *Mandamus* may issue to compel the speakers of two houses to issue a certificate of election.¹³

§ 5420. **What Writ shall Issue.**—When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance.¹⁴

¹ Singleton v. Commissioners, 2 Bay, 105; Dew v. Judges, 3 Hen. & M. 1; Street v. Gallatin County Commissioners, Breese, 25.

² Strong, Petitioner, 20 Pick. 484.

³ Lake Merced Water Co. v. Cowles, 31 Cal. 215; United States v. Guthrie, 17 How. U. S. 284.

⁴ Runkel v. Winemiller, 4 Har. & M. 459; People ex rel. Griffen v. State, 1 Edm. 505.

⁵ Union Church v. Sanders, 1 Heust. 100.

⁶ St. Luke's Church v. Slack, 7 Cush. 226.

⁷ State v. Wrotnowski, 17 La. Ann. 156.

⁸ People v. Hatch, 33 Ill. 9.

⁹ Marbury v. Madison, 1 Cranch, 137.

¹⁰ McCauley v. Brooks, 16 Cal. 11; Page v. Hardin, 8 B. Mon. 648.

¹¹ Fowler v. Pierce, 2 Cal. 165.

¹² Weston v. Dane, 51 Me. 461.

¹³ State v. Moffitt, 5 Ohio, 358.

¹⁴ Cal. Code C. P., sec. 1088.

§ 5421. **When Writ may Issue.**—The writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law,¹ and only in cases where the act to be done is ministerial.² When the effect of the application is to bring under review the decision of a superior court, the appellate jurisdiction given by the constitution attaches, and may be exercised by the means of the writ of *mandamus*.³ So it may issue to compel a court to certify a case to the circuit court of the United States.⁴ It is the only adequate mode of relief where an inferior tribunal refuses to act upon a subject brought properly before it.⁵ The supreme court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect.⁶ An order made in an action pending in the district court, staying all proceedings therein until the further direction of the court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the court to proceed.⁷ So of an order expelling certain attorneys from the bar, on the ground that they had set at defiance the authority of the court.⁸ A *mandamus* is the proper remedy to compel their restoration.⁹

Where the act of signing a judgment is merely ministerial, a *mandamus* may issue requiring the judge of an inferior court to do it.¹⁰ So upon an affidavit showing that the judge has neglected or refused to enter judgment,¹¹ to enter judgment on the report of a referee,¹² or to compel a justice of the peace to enter a judgment of discontinuance.¹³ But when the act to be done is judicial or discretionary, the writ will not direct what decision shall be made, nor will it be granted after the inferior tribunal has acted, for the purpose of reviewing the legality of its decision.¹⁴ A *mandamus* may issue to compel a judge to

¹ Cal. Code C. P., sec. 1086; *Merced Mining Co. v. Fremont*, 7 Cal. 130.

² *Draper v. Noteware*, 7 Cal. 276; *United States v. Guthrie*, 17 How. U. S. 284; *United States v. Seaman*, Id. 225.

³ *People v. Turner*, 1 Cal. 143.

⁴ See *Spraggins v. County Court of Humphries*, 1 Cooke, 160; but see, in certain cases, *Ladd v. Tudor*, 3 Woodb. & M. 325.

⁵ *Life and Fire Ins. Co. of New York v. Wilson*, 8 Pet. 201.

⁶ *Purcell v. McKune*, 14 Cal. 231; *Smith v. Jackson*, 1 Paine, 453; *Matter of Turner*, 5 Ohio, 542, 544.

⁷ *Rhodes v. Craig*, 21 Cal. 419.

⁸ *People v. Turner*, 1 Cal. 143.

⁹ Id.; *Herrington v. Sawyer*, 36 Cal. 289; see *Ex parte Bradley*, 7 Wall. 364; *People v. Justices of Delaware*, 1 Johns. Cas. 181; *Withers v. State*, 36 Ala. 252.

¹⁰ *Life and Fire Ins. Co. of New York v. Wilson*, 8 Pet. 201.

¹¹ *Ex parte Bradstreet*, 6 Pet. 774.

¹² In this case there was no remedy by appeal: *Russell v. Elliott*, 2 Cal. 245.

¹³ *Anderson v. Pennie*, 32 Cal. 265.

¹⁴ *People v. Sexton*, 24 Cal. 78.

settle a bill of exceptions first, and then to sign it;¹ or a statement on motion for a new trial;² or to set aside the grant of a new trial.³ A peremptory writ of *mandamus* is a proper remedy to enforce delivery of books, papers, etc., to a newly elected judge of probate.⁴

Where, pending a motion for a new trial in the district court, the defendants violate an injunction previously issued by said district court, this court will issue a *mandamus* against the judge of such district court, to compel him to issue his attachment for contempt.⁵ A *mandamus* will issue from a superior to an inferior court to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form a case of contempt.⁶ The court may grant a peremptory *mandamus* to compel a district judge to execute a sentence pronounced by him, although subsequently to its rendition an act of the legislature of the state comprising the district was passed, authorizing the governor of the state to prevent its execution.⁷

§ 5422. **When It will not Issue.**—A *mandamus* will not lie where a party may have a remedy by a writ of error;⁸ as on an order punishing for contempt;⁹ nor where there is any other specific, speedy, and adequate remedy,¹⁰ and one competent to afford relief upon the very subject-matter;¹¹ nor will it lie if the right of the party applying therefor is not clear.¹² The general rule that a *mandamus* will not lie where the party has another remedy must be understood to refer to some specific remedy which will place the party in the same situation in which he was before the act complained of;¹³ as where there is a remedy by appeal, as to compel the entry of a decree on the report of a referee;¹⁴ so from order denying the trebling of damages in forcible entry and detainer;¹⁵ so where a court refuses to enter

¹ *People v. Lee*, 14 Cal. 512; *People v. Judges*, 1 Cal. 511; *McDonald v. Sheldon*, 2 Kan. 322; *State v. Todd*, 4 Ohio, 351.

² *People v. Rosborough*, 29 Cal. 415.

³ *People v. Superior Court*, 10 Wend. 285.

⁴ *Crowell v. Lambert*, 10 Minn. 369.

⁵ *Ortman v. Dixon*, 9 Cal. 23; *Merced Mining Co. v. Fremont*, 7 Id. 130.

⁶ *Merced Mining Co. v. Fremont*, 7 Cal. 130.

⁷ *United States v. Peters*, 5 Cranch, 115.

⁸ *United States v. Addison*, 22 How. U. S. 174; *Commissioners of Patents v. Whiteley*, 4 Wall. 522.

⁹ *People v. Turner*, 1 Cal. 152.

¹⁰ *Crandall v. Amador County*, 20 Cal. 72; *People v. Olds*, 3 Id. 175; *Louisville R. R. Co. v. State*, 25 Ind. 177.

¹¹ *Fremont v. Crippen*, 10 Cal. 211.

¹² *United States v. Bank of Alexandria*, 1 Cranch C. C. 7; *State v. Justices of Moore*, 2 Ired. 430; *People v. Brooklyn*, 1 Wend. 318.

¹³ *Etheridge v. Hall*, 7 Port. 47; *People v. Supervisors of Greene*, 12 Barb. 217; 17 Ala. 527; 13 Pa. St. 72.

¹⁴ *Ludlum v. Fourth District Court*, 9 Cal. 12.

¹⁵ *Early v. Mannix*, 15 Cal. 149.

judgment for costs;¹ or a judgment of dismissal.² A claim to a writ of *mandamus* can not be sustained if there is any other equally effectual remedy.³ *Mandamus* will not lie to compel a court to proceed with the trial after an order changing the place of trial; or where the district court refuses to transfer an indictment to another district court for trial;⁴ nor to command him to recall an order after final judgment, if an appeal could be taken;⁵ nor to compel a circuit judge to vacate an order;⁶ nor where a court refuses to proceed for want of a statement, in a chancery case;⁷ nor for refusal or allowance of a change of venue;⁸ nor to reinstate a case when the appeal has been dismissed, even if the court acted erroneously in dismissing it.⁹ In a matter in which the county court has final jurisdiction and acts, there is no remedy, even if it acts erroneously;¹⁰ as in the entering of judgment;¹¹ or the filling of a blank in a judgment with the amount of costs, after judgment was affirmed by the supreme court.¹² The supreme court will not issue a *mandamus* to compel a superior judge to decide contrary to his own judgment;¹³ nor to compel a judge to issue a warrant of arrest in a particular case;¹⁴ nor to re-examine a decision on the sufficiency of the affidavit to hold to bail;¹⁵ nor to compel a district court to expunge amendments improperly made in the record returned to the circuit court on a writ of error;¹⁶ nor to compel a judge to allow a defendant to take possession of goods provisionally seized, upon his depositing in court a sum to be fixed by the judge;¹⁷ nor to compel a district court to review its judgment;¹⁸ nor to permit an allowance of double pleas;¹⁹ nor to permit the intervention of new parties;²⁰ nor will it compel a court to withdraw an issue, and direct a new issue to be made up.²¹ It will not be issued to admit a person to an office while another holds

¹ *Peralta v. Adams*, 2 Cal. 594.

² *People v. Pratt*, 28 Cal. 166; see *In re Spring Valley Water Works*, 17 Cal. 132.

³ *Bush v. Beavan*, 1 Hurl. & Colt. 500.

⁴ *People etc. v. Judge of Twelfth District*, 17 Cal. 547.

⁵ *People v. Moore*, 29 Cal. 427.

⁶ *State v. Taylor*, 19 Wis. 566; see, generally, *State v. Carney*, 3 Kan. 88.

⁷ *Purcell v. McKune*, 14 Cal. 230.

⁸ *People ex rel. Flagley v. Hubbard*, 22 Cal. 34.

⁹ *People v. Weston*, 28 Cal. 639; *Lewis v. Barclay*, 35 Id. 213.

¹⁰ *People v. Weston*, 28 Cal. 639; *Lewis v. Barclay*, 35 Id. 213.

¹¹ *Cariaga v. Dryden*, 29 Cal. 307.

¹² *Ex parte Many*, 14 How. U. S. 24.

¹³ *United States v. Lawrence*, 3 Dall. 42.

¹⁴ *Id.*

¹⁵ *Ex parte Taylor*, 14 How. U. S. 3.

¹⁶ *Smith v. Jackson*, 1 Paine, 453.

¹⁷ *State v. Judge of the Third District*, 17 La. Ann. 328.

¹⁸ *Ex parte Hoyt*, 13 Pet. 279.

¹⁹ *Ex parte Davenport*, 6 Pet. 661.

²⁰ *White v. United States*, 1 Black, 501.

²¹ *Bank of Columbia v. Sweeny*, 1 Pet. 567.

it under color of right.¹ If an office is filled *de facto*, it will not lie for the purpose of trying title to it.²

§ 5423. **Alternative Mandamus.**

Form No. 1206.

[TITLE.]

The people of the state of California to [the tribunal, corporation, board, or person to whom it is directed], greeting:

Whereas it manifestly appears to us by the affidavit of J. Q., on the part of the said A. B., the plaintiff and the party beneficially interested herein, that [state generally the allegation against the party to whom it is directed], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you that immediately after the receipt of this writ you do [the act required to be performed], or that you show cause before this court, at the court-room thereof in the city hall, in the county of, on the day of, 18.., at the opening of the court on that day, why you have not done so.

Witness, the Hon. J. P., judge of our superior court of the state of California, at the, in the county of, and the seal of said court, this day of, 18..³

§ 5424. **Disobedience of Writ.**—When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.⁴

§ 5425. **Form of Writ.**—The writ may be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place,

¹ State v. Auditor, 36 Mo. 70.

² Meredith v. Board of Supervisors, 50 Cal. 433.

³ The form of petition or affidavit is

not given, as it is like any affidavit or complaint in other proceedings. The facts should be set out.

⁴ Cal. Code C. P., sec. 1097.

why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return-day inserted.¹ The writ must recite all the facts entitling the relator to have the act done for which he asks.² It is not enough to refer to the petition and affidavits.³ The command of the writ must be according to the duty.⁴ The writ must correspond to the order directing its issue.⁵ One and the same writ can not be directed to two several townships.⁶ It is not fatal if it be directed to the members of a corporation, instead of the corporation by its corporate name.⁷

§ 5426. **Peremptory Mandamus.**

Form No. 1207.

[TITLE.]

The people of the state of California to [the tribunal, corporation, board, or person to whom it is directed], greeting:

Whereas it manifestly appears to us by the affidavit of J. Q., on the part of the said A. B., the plaintiff and the party beneficially interested herein, that [state generally the allegation against the party to whom it is directed], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you that immediately after the receipt of this writ you do [the act required to be performed]. And of this writ, and what you have done thereunder, make due return on or before the day of, 18..

Witness, the Hon. J. P., judge of the superior court of the state of California, at the court-house in the county of, and the seal of said court, this day of, 18..

J. K., Clerk.

By L. M., Deputy Clerk.

§ 5427. **Proceedings and Practice on Mandamus—Affidavit.**—It shall be issued upon affidavit, on the application of the party beneficially interested.⁸ It must be shown distinctly by the affidavits that the possession under a writ of restitution

¹ Cal. Code C. P., sec. 1087.

² Commercial Bank v. Canal Com'rs, 10 Wend. 25.

³ Id.; People v. Supervisors of Westchester Co., 15 Barb. 760.

⁴ People v. Supervisors of Dutchess Co., 1 Hill, 50; People v. Supervisors of New York, Id. 362.

⁵ Hawkins v. More, 3 Ark. 345.

⁶ State v. Chester & Evesham, 5 Halst. 292.

⁷ Fuller v. Plainfield Academic School, 6 Conn. 532. For forms of writ of *mandamus*, commanding city council to direct city treasurer to pay claims allowed by school board, see State v. City of Cincinnati, 19 Ohio, 182.

⁸ Cal. Code C. P., sec. 1086; People v. Pacheco, 29 Cal. 210; Ex parte Fleming, 2 Wall. 759.

was acquired under the parties, or subsequent to the filing of a *lis pendens*, or the application will be denied.¹

§ 5428. **Demand a Condition Precedent.**—It is an imperative rule of the law of *mandamus* that previously to the making of the application to the court for the writ, to command the performance of a particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied—it being due to the defendant to have the option of either doing or refusing to do that which is required of him before an application shall be made to the court for the purpose of compelling him.²

§ 5429. **Determination.**—Judgment may be affirmed as to the *mandamus*, and reversed as to the costs.³ In *mandamus* to compel the execution of a sheriff's deed, the proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* can not determine these rights, or in any respect the interest of third parties.⁴

§ 5430. **Hearing.**—The writ can not be granted by default. The case shall be heard by the court, whether the adverse party appear or not.⁵ If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.⁶ If a material question of fact be raised by the answer, the court may, in its discretion, order it tried by a jury, and postpone the argument until the trial can be had and the verdict certified to the court. The question must be distinctly stated in the order for trial, and the county designated where the trial shall be had.⁷

§ 5431. **Judgment.**—If judgment be given for the applicant, he may recover the damages he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory

¹ *Fogarty v. Sparks*, 22 Cal. 143.

² *People v. Romero*, 18 Cal. 90;
Crandall v. Amarator County, 20 Id. 72;
Oroville and Virginia City R. R. Co.
v. Supervisors of Plumas County, 37
Id. 363.

³ *McDougal v. Roman*, 2 Cal. 80.

⁴ *McMillan v. Richards*, 9 Cal.
365.

⁵ Cal. Code C. P., sec. 1088.

⁶ Id., sec. 1094.

⁷ Id., sec. 1090.

mandate must also be awarded without delay.¹ A disobedience of a peremptory mandate may be punished by fine not exceeding one thousand dollars, and if the refusal to obey the writ is persisted in, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.²

§ 5432. **New Trial.**—The motion for a new trial must be made in the court in which the issue of fact was tried.³ If no notice for a new trial be given, or if given, be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.⁴

§ 5433. **Notice of the Application.**

Form No. 1208.

To

You are hereby notified that will apply to the superior court within and for the county of, on the first day of its next term, for a writ of *mandamus* to issue against you, commanding you [here state the prayer of the petition, and so much of the facts as shows what the party is required to do].

[DATE.]

[SIGNATURE.]

§ 5434. **Notice of Application.**—The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default.⁵ Where notice of the motion, and a copy of the papers on which the motion is founded, have been duly served on the district judge, this court may, in its discretion, issue either an alternative or a peremptory writ, in the first instance.⁶

§ 5435. **Proceedings, where. Commenced.**—Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner can be commenced in the county where the relator resides.⁷ The provisions of the statute that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, and not to mere omissions or neglect of official duty.⁸ The rules of the

¹ Cal. Code C. P., sec. 1095; see also Id., sec. 1090.

² Id., sec. 1097.

³ Id., sec. 1092.

⁴ Id., sec. 1093.

⁵ Cal. Code C. P., sec. 1088.

⁶ People v. Turner, 1 Cal. 143.

⁷ McMillan v. Richards, 9 Cal. 420.

⁸ Id. 365.

civil practice act are applicable to pleadings and proceedings in *mandamus*.¹

§ 5436. **Relief Awarded.**—If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay.² Where an alternative writ is not procured, the court may grant any relief consistent with the case made by the petition and embraced within the issue, although it may be only part of that asked in the prayer of the petition.³

§ 5437. **Return.**—The return, to be sufficient, must show a legal justification;⁴ as that a bill of exceptions tendered was not a true bill.⁵ When objectionable, the judge should return the causes of objection.⁶ In a return to a *mandamus* to restore a member to a church, the power of those to expel him should be stated.⁷ The return must respond to the allegations of the writ.⁸ Under the code, issue may be taken on the truth of the return. At common law, the return was conclusive.⁹ The return may be amended.¹⁰ The proper way for the justices of a county to make return to a *mandamus* is for them to convene, and a majority being present, to fix upon the facts they mean to rely on by way of defense, and appoint some one of their body to make affidavit, and to do all other things required by the proceeding.¹¹

§ 5438. **Service of Writ.**—The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.¹²

§ 5439. **Pleadings in Mandamus—Answer.**—On the return of the alternative, or the day on which the application of the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the

¹ People v. Board of Supervisors of San Francisco, 27 Cal. 665.

² Cal. Code C. P., sec. 1095.

³ People v. Board of Supervisors of San Francisco, 27 Cal. 665.

⁴ Burnet v. Auditor etc., 12 Ohio, 54.

⁵ State v. Todd, 4 Ohio, 351.

⁶ People v. Pearson, 2 Scam. 189.

⁷ Green v. Af. Meth. Ch., 1 Sandf. 254.

⁸ Gorgas v. Blackburn, 14 Ohio, 252.

⁹ State v. Wil. Bridge Co., 3 Harr. 540.

¹⁰ Springfield v. Hamden, 10 Pick. 59.

¹¹ Lander v. McMillan, 8 Jones L. 174.

¹² Cal. Code C. P., sec. 1096.

same manner as an answer to a complaint in a civil action.¹ The answer of a board of supervisors should be in form the answer of the board in its aggregate capacity.² And the fact that it was sworn to by one member of the board does not make it his answer, nor is it necessary that such answer should aver that the board by resolution adopted it.³ If two answers be filed, each in form of the answer of the board, the court may ascertain which is the return of the majority.⁴

§ 5440. **Demurrer to Answer.**—On the trial, the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof, either in direct denial, or by way of avoidance.⁵ A motion for judgment on the pleadings is equivalent to a demurrer to the answer, and objections which are required to be taken by special demurrer will be disregarded on such motion.⁶ The general rule that if a party whose duty it is to perform some act bases his refusal to perform it on some defect in the proceedings of his adversary, he will not afterwards be permitted to allege a new or additional defect, does not apply to officers whose duties are governed by law.⁷

§ 5441. **Petition for Mandamus.**—The writ is issued upon affidavit, on the application of the party beneficially interested.⁸ An application for a writ of *mandate*, to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people, and is not signed by the attorney general, but by an attorney of the relator, will not be dismissed because not made in the name of some one interested, if the attorney general unites in the brief in support of the application.⁹ A petition for a *mandamus* to compel county commissioners to declare the petitioner register of deeds should aver affirmatively that a vacancy existed when the alleged election took place.¹⁰ A statement in a petition against a comptroller is bad if it fails to allege that there is “money not otherwise appropriated by law” out of which the compensation

¹ Cal. Code C. P., sec. 1089.

² People v. Board of Supervisors, 27 Cal. 665.

³ Id.

⁴ Id. As to answer of treasurer on demand made upon him to pay a warrant drawn by the auditor, see Keller v. Hyde, 20 Cal. 594; Connor v. Morris, 23 Id. 451.

⁵ Cal. Code C. P., sec. 1091.

⁶ People v. Board of Supervisors, 27 Cal. 665; Ward v. Flood, 48 Id. 36.

⁷ Id.

⁸ Cal. Code C. P., sec. 1086.

⁹ People v. Board of Supervisors of San Francisco, 36 Cal. 595. Averments necessary in petition for a *mandamus* to a county treasurer to pay county warrants, see Connor v. Morris, 23 Cal. 447. For sufficient statement in *mandamus* on declaring the result of an election, see Calaveras Co. v. Brockway, 30 Cal. 325.

¹⁰ Rose v. County Commissioners, 50 Me. 243.

in question is to be paid.¹ In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go can be the relator.²

CHAPTER IV.

PROHIBITION.

§ 5442. **In General.**—The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.³ At common law it was issued by a superior court, to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction but to the cognizance of some other court.⁴ It may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed, or when by the exercise of its jurisdiction the inferior court would defeat a legal right.⁵ It may be issued by any court except police or justice's courts, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.⁶ The writ will lie to prevent the exercise of unauthorized power by an inferior tribunal, in cases where it has jurisdiction as well as where it has not.⁷ But it must be an excess of jurisdiction in an absolute sense, and not an erroneous exercise of power.⁸ The exercise of judicial and ministerial power must be distinguished. For an ex-

¹ Redding v. Bell, 4 Cal. 333.

² People v. Board of Supervisors of Alameda Co., 26 Cal. 641; see also Supervisors v. United States, 4 Wall. 435. When a petition for a peremptory mandate to the judge of a district court, to enter the name of the petitioner as an attorney of record in a cause, will be denied, see Herrington v. Sawyer, 36 Cal. 289. For petition for *mandamus* to command city council to direct city treasurer to pay

expenses incurred in the support of schools, see State v. City of Cincinnati, 19 Ohio, 178.

³ Cal. Code C. P., sec. 1102.

⁴ 3 Shars. Bla. Com. 112.

⁵ Buller N. P. 219; 2 Ch. Pr. 355.

⁶ Cal. Code C. P., sec. 1103; see also Sweet v. Hulbert, 51 Barb. 312; People v. Clute, 42 How. Pr. 157.

⁷ See Quimbo Appo v. People, 20 N. Y. 550.

⁸ People v. Whitney, 47 Cal. 564.

cess of the former the writ will lie, while for the latter it will not; as to restrain the issuing of an execution, or to restrain a ministerial officer from the execution of process in his hands.¹

Nor will this writ lie to bring under review the proceedings of an inferior tribunal merely upon the ground that they are erroneous;² nor where the tribunal has general jurisdiction of the cause will it lie to a mere point of practice;³ nor to deprive a court of jurisdiction conferred by statute.⁴ The writ of prohibition will not lie against the governor of a state to restrain him from granting a commission to a person claiming to be elected to a public office, for the reason that the judiciary has no power to invade the province of the executive, that being a distinct and independent department of the government.⁵ The common-law rule that the writ will not issue to an inferior tribunal in a cause arising out of its jurisdiction until the want of jurisdiction has first been pleaded in the court below and the plea refused, is believed to be applicable in most, if not all, the states. So held in Arkansas.⁶ The California code of civil procedure, section 1103, would seem to require this in all cases, as well when there was claimed to be no jurisdiction in the lower court, as where it is proceeding in excess of its jurisdiction; for every intendment, not only as to the regularity of the proceedings of all courts, will be indulged, but especially will it be presumed that every court, when its attention is properly called to an act in excess of its jurisdiction, will, if it be possible, undo the unauthorized act; hence the superior courts will, in cases where the inferior court can recall the act or afford proper relief—unless a direct application has been made to the lower court for that purpose and it has been denied—hold that there is a plain, speedy, and adequate remedy without granting the writ. As where an injunction has been granted in direct violation of the statute, and without any jurisdiction on the part of the court, prohibition will not be granted to prevent the court from proceeding with the injunction where no application has been made to dissolve it.⁷

Prohibition may be granted on the application of either of

¹ *Ex parte Brandladet*, 2 Hill, 367; *People v. Supervisors of Queens Co.*, 1 Id. 195, 201.

² *Ex parte Gordon*, 2 Hill, 363; *People v. Marine Court*, 36 Barb. 341; S. C., 14 Abb. Pr. 266; S. C., 23 How. Pr. 446; *People v. Russell*, 19 Abb. Pr. 136; S. C., 29 How. Pr. 176.

³ *Id.*

⁴ *People v. N. Y. Com. Pleas*, 18 Abb. Pr. 438; 43 Barb. 278.

⁵ *Greir v. Taylor*, 4 McCord, 206.

⁶ *Ex parte McMeechen*, 12 Ark. 70; *Ex parte City of Little Rock*, 26 Id. 52.

⁷ *Ex parte McMeechen*, 12 Ark. 70.

the parties litigant in the inferior tribunal.¹ Independently of the statute, it would seem, both upon principle and authority, that no personal interest in the proceedings sought to be prohibited need be shown by the relator or petitioner to warrant the application, and the writ may be granted upon the application of a stranger to the record. The governing principle in such cases is, that by proceeding without or in excess of its jurisdiction, the court is chargeable with a contempt of the sovereign as well as a grievance to the party injured.² The California code of civil procedure, section 1103, provides that the writ shall issue on the application of "the person beneficially interested." Whether the word "person," as here used, is restricted to the parties to the record has not, so far as we know, received judicial construction; but unquestionably a beneficial interest must be shown in the petitioner. Prohibition lies as well against a court of chancery as of law; and where such court has exceeded its powers in the appointment of a receiver, prohibition has been granted to restrain it from proceeding under the order of appointment.³ It should clearly appear that the inferior tribunal is actually proceeding or about to proceed in some matter over which it has no rightful jurisdiction. The acts which show this must be set out in the application for the writ.⁴ It is, however, well settled that, in a proper case, the writ will lie even after verdict, sentence, or judgment. Where the court has proceeded thus far, prohibition will not lie for a want of jurisdiction not apparent upon the record; but if the want of jurisdiction clearly appear on the face of the record, it will.⁵ The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return-day inserted.⁶

¹ Clapham v. Wray, 12 Mod. 423.

² See High's Extraordinary Legal Remedies, sec. 779, and cases cited.

³ Ex parte Smith, 23 Ala. 94.

⁴ Prignitz v. Fischer, 4 Minn. 366.

⁵ See High's Extraordinary Legal Remedies, sec. 774, and notes.

⁶ Cal. Code C. P., sec. 1104. The provisions of sections 1088 to 1097, inclusive, of the code of civil procedure, apply to this proceeding as well as to the writ of mandate: Id., sec. 1105.

§ 5443. **Affidavit on Application for Writ.**

Form No. 1209.

[TITLE OF COURT TO WHICH THE APPLICATION IS MADE.]

[VENUE.]

A. B., of, in the county of, being first duly sworn, says that, etc. [stating such facts as show the relator to be entitled to the writ and the relief demanded]. And that he makes this affidavit for the purpose of procuring a writ of prohibition to be issued out of this court to the said and, to prohibit and restrain them and each of them from [stating the acts to be prohibited].

Wherefore he prays for the issuance of such writ, and for such other and further relief as he may be entitled to.

[JURAT.]

[SIGNATURE.]

§ 5444. **Affidavit.**—The affidavit should show that the affiant has either knowledge or information concerning the matters stated in it.¹ If the application is submitted on the affidavit and answer, and the answer denies the material allegations of the affidavit, the application will be dismissed.² As there is no cause in court until the writ is allowed, the affidavit should not be entitled in any cause.

§ 5445. **Notice of Motion for Writ.**

Form No. 1210.

[TITLE.]

To C. D.

Please take notice that I will move the court at [etc.], on the day of, 18 . . ., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order that a writ of prohibition issue directed to [name the court or tribunal], and to, the judge thereof, and, and commanding them to desist and refrain from any further proceedings in [state the suit or proceeding sought to be prohibited], or for such further or other relief as the court may see proper to grant; which motion will be based upon the affidavit of A. B. (and the record of said proceedings, designating all papers to be used), copies of which are herewith served.

Yours, etc.,

B. D., Attorney for A. B.³

[DATED, ETC.]

¹ *Cariaga v. Dryden*, 30 Cal. 244. given, it must be at least ten days: Cal. Code C. P., sec. 1088; see also

² *Id.*

Id., sec. 1005.

³ When notice of the application is

§ 5446. **Alternative Writ of Prohibition.***Form No. 1211.*

[TITLE.]

The people of the state of California, to the court of
, and to, greeting:

Whereas A. B., of, lately in our court at,
 on the day of, 18.., represented to our said court,
 that, etc. [stating the facts and proceedings complained of].

Nevertheless, you, the said court aforesaid, and the said
, well knowing the premises, yet contriving as it is
 said, the said A. B., unjustly to aggrieve and oppress, have
 [stating grievances], in contempt of us, against the laws and
 customs of our said state, and to the manifest damage, pre-
 judice, and grievance of him, the said A. B. Wherefore the
 said A. B. has prayed relief, and our writ of prohibition in that
 behalf.

We therefore, being willing that the laws and customs of our
 said state should be observed, and that our citizens should in no
 wise be oppressed, do command you that you desist and refrain
 from any future proceedings in [stating the matter to be prohib-
 ited] until the day of, 18.., and until the further
 order of this court thereon; and that you show cause, before
 our said court, at the time last aforesaid, at the court-room of
 this court, in, why you should not be absolutely re-
 strained and prohibited from any further proceedings in such
 suit or matter. And have you then and there this writ.

Witness, judge [or justice] of said court at,
 the day of, 18..

[SEAL.]

M. W., Clerk.¹

§ 5447. **Answer.**—On the return of the alternative, or the
 day on which the application for the writ is noticed, the party
 on whom the writ or notice has been served may show cause by
 answer under oath, made in the same manner as an answer to a
 complaint in a civil action.² If an answer be made which raises
 a question as to a matter of fact essential to a determination of
 the motion, and affecting the substantial rights of the parties,
 and upon the supposed truth of which the application for the
 writ is based, the court may, in its discretion, order the ques-
 tion to be tried before a jury, and postpone the argument until
 such trial can be had, and the verdict certified to the court.
 The question to be tried must be distinctly stated in the order

¹ In peremptory writ the clause relat- and a return-day inserted: Cal. Code
 ing to showing cause, etc., is omitted, C. P., sec. 1104. ² Id., sec. 1089.

for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages the applicant may have sustained, in case they find for him.¹

§ 5448. **Demurrer.**—The sufficiency of the answer is determined under the rules applicable to answers in general. A motion to strike out and disregard the answer as immaterial is in effect a general demurrer.² So is a motion that the writ issue notwithstanding the answer.³

§ 5449. **Default.**—The writ can not be granted by default. The case must be heard by the court whether the adverse party appear or not.⁴

§ 5450. **Hearing and Practice.**—If no answer be made the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.⁵ On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may counterveil it by proof either in direct denial, or by way of avoidance.⁶ The practice is the same as in *mandamus*.⁷

§ 5451. **Punishment.**—For a neglect or refusal to obey a peremptory writ of prohibition, the party may be punished by a fine not exceeding one thousand dollars, and for a persistent refusal may be imprisoned until the writ is obeyed.⁸

§ 5452. **Service of Writ.**—The writ may be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.⁹

¹ Cal. Code C. P., sec. 1090.

² Middleton v. Low, 30 Cal. 599.

³ Ward v. Flood, 48 Cal. 46.

⁴ Cal. Code C. P., sec. 1094.

⁵ Id., sec. 1088.

⁶ Id., sec. 1091.

⁷ See, generally, the preceding chap-

ter on that subject, and Cal. Code C. P., secs. 1088 to 1105, inclusive; see also High's Extraordinary Legal Remedies, sec. 795 et seq.

⁸ Cal. Code C. P., sec. 1097.

⁹ Cal. Code C. P., sec. 1096.

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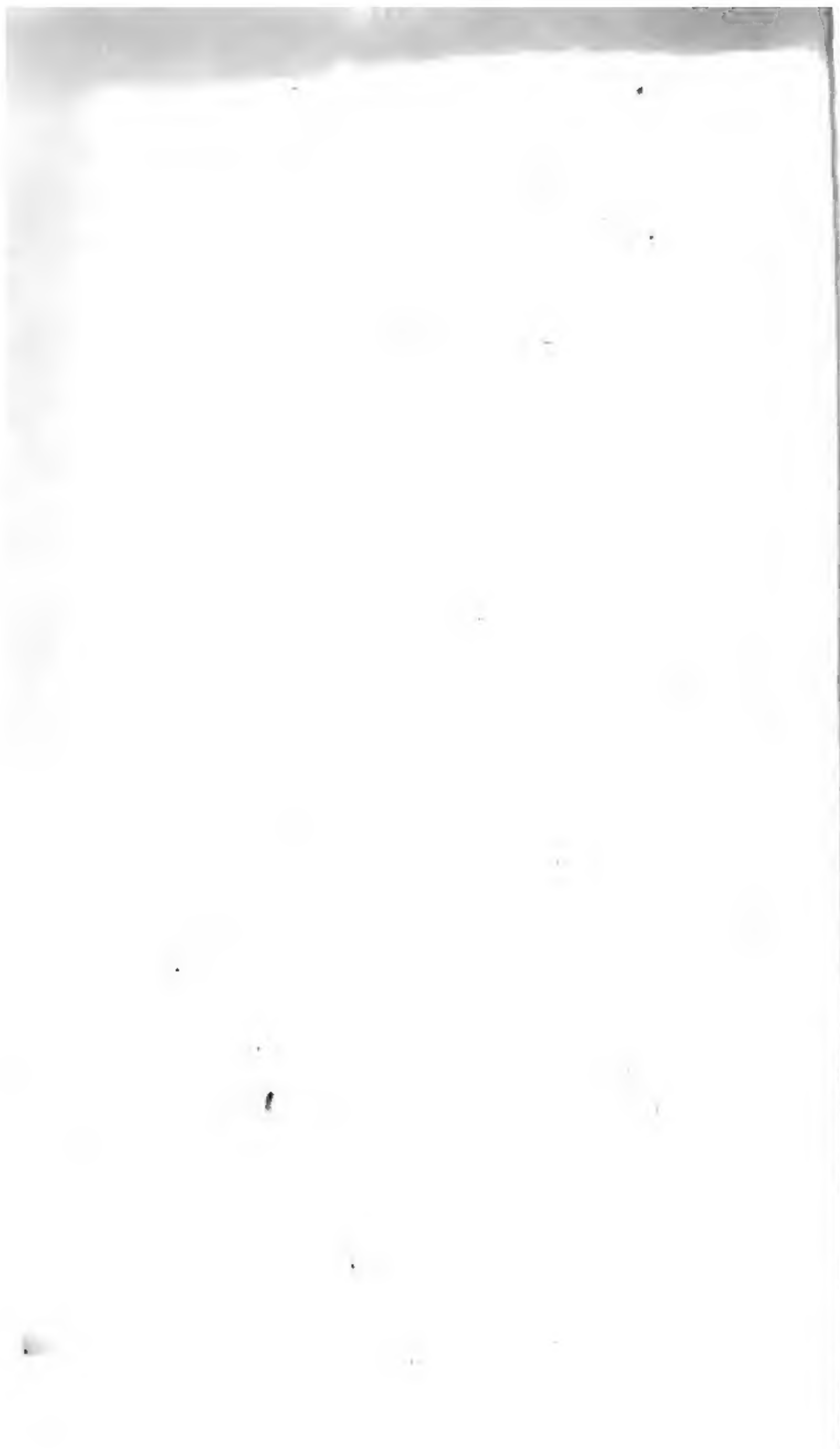
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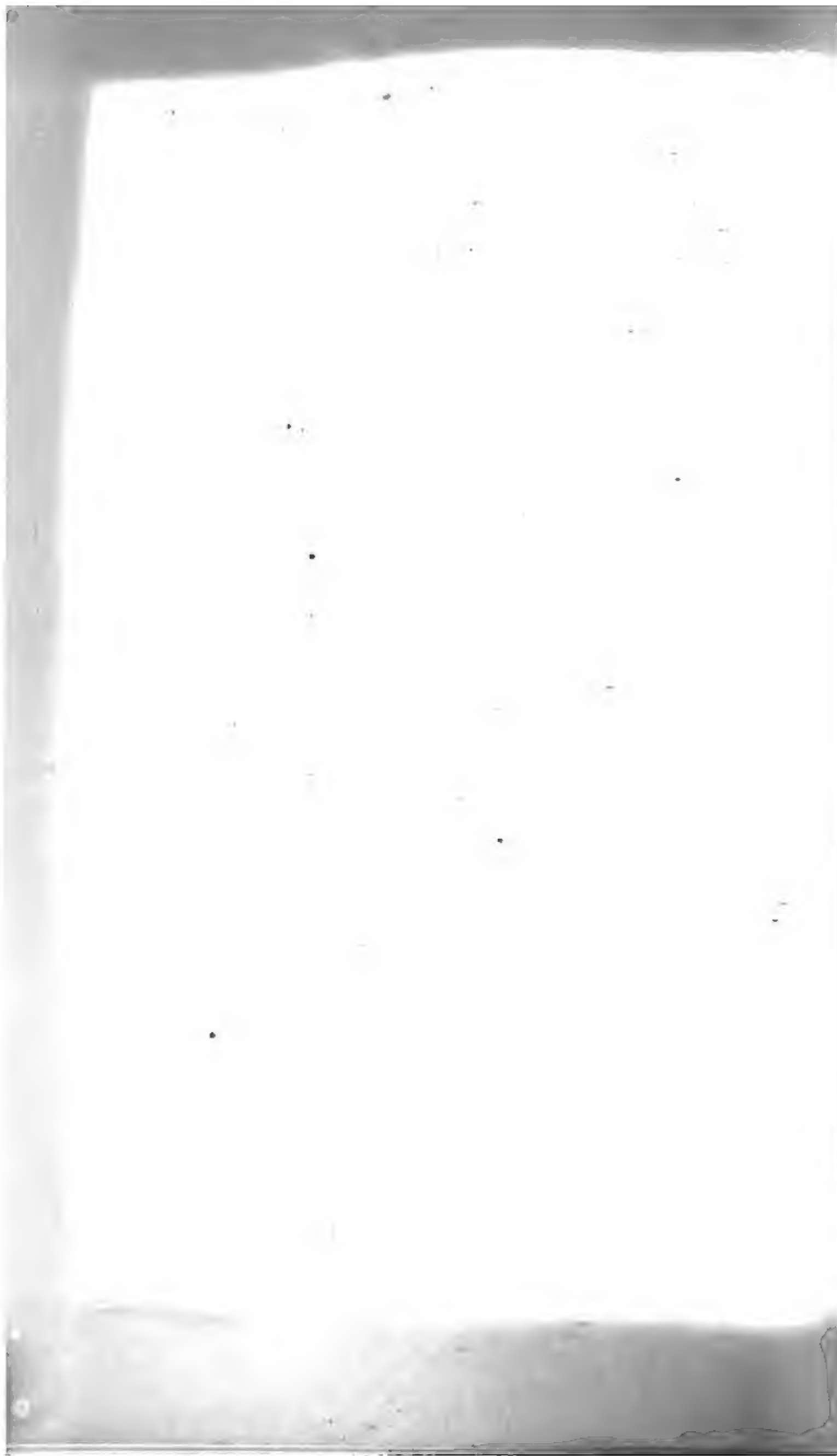
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